CERTIORARI.

Supreme Court of the United States.

OCTOBER TERM, 1942.

No. 94

MARY TENNANT, ADMINISTRATRIX OF THE ESTATE OF HAROLD C. TENNANT, DECEASED, PETITIONER,

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 8, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No.

MARY TENNANT, ADMINISTRATRIX OF THE ESTATE OF HAROLD C. TENNANT, DECEASED,

Petitioner,

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD

In the

United States Circuit Court of Appeals

For the Seventh Circuit

No. 8128

MARY TENNANT, Administratrix of the Estate of Harold C. Tennant, Deceased,

Plaintiff-Appellee,

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation,

Defendant-Appellant.

U. S. C. C. A.-7
FILED
NOV 9 - 1942
KENNETH J. CARRICK
CLERK

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

TRANSCRIPT OF RECORD FILED OCT. 3, 1942.
PRINTED RECORD.

In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 8128

MARY TENNANT, ADMINISTRATRIX OF THE ESTATE OF HAROLD C. TENNANT, DECEASED,

Plaintiff-Appellee,

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, A CORPORATION,

Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

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1 Pleas in the District Court of the United States of America, within and for the Northern Division of the Southern District of Illinois, held in the city of Peoria, in said Division and District before the Honorable J. Leroy Adair, one of the Judges of said Court, on Monday, the 21st day of April, in the year of our Lord One Thousand Nine Hundred Forty-one, and of the Independence of the United States of America, the one hundred and sixty-fifth. Placita

Present:

J. Leroy Adair, United States District Judge.
Paul E. Ruppel, United States Marshal.
Howard L. Doyle, United States Attorney.
G. W. Schwaner, Clerk, United States District Court.

Attest:
G. W. Schwaner,
Clerk.

2 Pleas in the District Court of the United States of America, within and for the Northern Division of the Southern District of Illinois, held in the city of Peoria, in said Division and District before the Honorable J. Leroy Adair, one of the Judges of said Court, on Monday, the 20th day of October, in the year of our Lord One Thousand Nine Hundred Forty-one, and of the Independence of the United States of America, the one hundred and sixty-sixth.

Present:

J. Leroy Adair, United States District Judge.
Paul E. Ruppel, United States Marshal.
Howard L. Doyle, United States Attorney.
G. W. Schwaner, Clerk, United States District Court.

Attest:
G. W. Schwaner,
Clerk.

3 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of Illinois,

Northern Division.

Mary Tennant, Administratrix of the Estate of Harold C. Tennant, Deceased, *vs.* Peoria & Pekin Union Railway Company, a Corporation.	Civil Action No. P-133.

Be It Remembered, that heretofore, to wit: on the 29th day of September, in the year of Our Lord One Thousand Nine Hundred Forty-one, that being one of the days of the April, A. D. 1941 Term of the District Court of the United States for the Northern Division of the Southern District of Illinois, there was filed in the office of the clerk of said Court, a certain Complaint. (said Complaint not called for in the Designations of the Defendant-Appellant, and there being no Designation filed by the Plaintiff-Appellee);

And further, on the 21st day of January, in the year of our Lord One Thousand Nine Hundred Forty-two, that being one of the days of the October, A. D. 1941 Term of the District Court of the United States for the Northern Division of the Southern District of Illinois, there was filed in the office of the clerk of said Court, a certain Amended Complaint, said Amended Complaint being in the words and figures following, to-wit:

Filed Sept. 29, 1941. 4 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-133) * *

AMENDED COMPLAINT.

Plaintiff files this, her amended complaint, and for her cause of action states:

1. That jurisdiction is founded on the existence of a federal question arising under particular statutes. The action arises under the Act of April 22, 1908, Chapter 149,

35 Stat. 65, as amended, known as the Federal Employers' Liability Act (45 U. S. C. A. §§ 51-60), as hereinafter more particularly appears.

2. That plaintiff is the duty appointed, qualified and acting administratrix of the estate of Harold C. Tennant, deceased, under and by virtue of her appointment by the County Court, in probate, of the County of Tazewell, Illinois, and, as such administratrix, institutes and prosecutes this suit in behalf of Mary Tennant, the surviving widow of Harold C. Tennant, deceased, and Elizabeth Jean Tennant, the surviving minor depended daughter of Harold C. Tennant, deceased.

3. That at all times herein mentioned, the defendant was a corporation organized and existing by virtue of law, and engaged in the business of operating a railroad system as a common carrier of goods, freight and passengers for hire in interstate commerce between the United States of America, and that defendant owned, operated, maintained and controlled railroad properties, lines, tracks, yards, trains, engines and cars for such purposes.

5 4. That on and for a long time prior to the 12th day of July, 1940, Harold C. Tennant was a servant in the employ of the defendant, earning approximately $180.00 per month as a railroad switchman, working in defendant's "A" and "B" switch Yards at or near Peoria and East Peoria, Illinois; that a part of the duties of said Harold C. Tennant in said employment was in the furtherance of the interstate transportation business of defendant; and that, by reason thereof, said Harold C. Tennant and defendant were subject to the terms and provisions of said Federal Employers' Liability Act, and engaged in interstate commerce and transportation within he meaning of said Act.

5. That defendant, in the operation of said yards, railroad system, lines and properties, had adopted certain rules and regulations known as "Peoria & Pekin Union Railway Company's Transportation Rules," which were theretofore promulgated by said defendant; that said rules and regulations became effective on or about the 1st day of January, 1929, and were in full force and effect at all times thereafter, particularly upon the 12th day of July, 1940; that said rules and regulations provided, among other things, as follows:

"30. The engine bell must be rung when an engine is

about to move and while approaching and passing public crossings at grades, and to prevent accidents."

6. That the defendant, its agents, servants and employees (other than the said Harold C. Tennant) on the 12th day of July, 1940, while the said Harold C. Tennant was working on or about an engine and cars which were being moved and switched in defendant's yards, did negligently and carelessly, and in violation of the aforesaid rule, fail and omit to ring the engine bell when said engine was about to move, and did negligently and carelessly move said engine without ringing said bell, as aforesaid.

6 7. That defendant, its agents, servants and employees, who were then and there engaged in making switching movements in said yards, negligently and carelessly failed and omitted to exercise ordinary care to discover the whereabouts of said Harold C. Tennant while he was working on or about one of defendant's trains in said yards as a member of said switching crew, and did negligently and carelessly move said engine and cars at a time when the whereabouts of the said Harold C. Tennant were unknown to and undiscovered by the aforesaid members of said switching crew.

8. That on the 12th day of July, 1940, while said Harold C. Tennant was then and there engaged in the line and scope of his duties and employment as aforesaid, and while he was acting as a switchman on one of defendant's trains, and while he was then and there working on or about one of defendant's trains in the course of switching operations in defendant's said yard, defendant, its agents, servants and employees (other than said Harold C. Tennant), moved, propelled and operated the cars of said train into collision with said Harold C. Tennant, directly thereby causing him to be crushed and run over by said cars, and to sustain fatal injuries whereof he died on said 12th day of July, 1940, all as a result, in whole or in part, of the aforesaid negligence and carelessness of the aforesaid agents, servants and employees of said defendant, to the injury and damage of said Mary Tennant and said Elizabeth Jean Tennant, and to the injury and damage of this plaintiff as their representative herein, in the sum of Sixty Thousand Dollars ($60,000.00).

Wherefore, plaintiff prays judgment against the defend

ant in the sum of Sixty Thousand Dollars ($60,000.00), together with her costs.

/s/ Mark D. Eagleton,
/s/ E. V. Champion,
Attorneys for Plaintiff.

7 Plaintiff demands a trial by jury in this cause.—

/s/ Mark D. Eagleton,
/s/ E. V. Champion,
Attorneys for Plaintiff.

We hereby acknowledge service of a copy of the within and foregoing Amended Complaint this 21st day of January, 1942.

/s/ E. E. Horton,
Attorney for Defendant.

Endorsed: Filed Jan. 21, 1942, G. W. Schwaner, Clerk.

8 And afterwards, to-wit: on the 3rd day of February, A. D. 1942, the following further proceedings were had in said court and were entered of record in said cause, to-wit: Entered Feb. 3, 1942.

9 In the District Court of the United States.

(Caption—P-133)

Tuesday, February 3, 1942.

Court met pursuant to adjournment.

Present, the Honorable J. Leroy Adair, Judge.

And now on this 3rd day of February, A. D. 1942, comes the plaintiff herein by E. V. Champion, her attorney, and comes also the defendant herein, by E. E. Horton, its attorney, and it is ordered by the court that the said defendant be granted leave to file pleading by February 6, 1942.

Filed Feb. 5, 1942.

10 And afterwards, to-wit: on the 5th day of February, A. D. 1942, there was filed in the office of the clerk of said court, a certain Notice of Filing of Answer to Amended Complaint and Answer to Amended Complaint, which said Notice and Answer were and are in the words and figures following, to-wit:

11 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-133) * *

NOTICE OF FILING OF ANSWER TO AMENDED COMPLAINT.

Please take notice that defendant will file with the Clerk of the Court aforesaid, its Answer to the Amended Complaint, a copy of which is hereto attached.

Peoria and Pekin Union Railway Company, a Corporation,
Defendant.
By E. E. Horton,
Its Attorney.

Received the above notice this 5th day of February, A. D. 1942.

Mark D. Eagleton,
E. V. Champion.

Endorsed: Filed Feb. 5, 1942, G. W. Schwaner, Clerk.

12 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-133) * *

ANSWER TO AMENDED COMPLAINT.

Now comes Peoria and Pekin Union Railway Company, a corporation, defendant herein, by E. E. Horton, its attorney, within the time granted by the Court to file the same, and for answer to said Amended Complaint says:

1. The defendant denies the allegations and the conclusion stated in paragraph 1 of the Amended Complaint.

2. The defendant neither admits nor denies the allegations of paragraph 2 of the Amended Complaint but demands strict proof thereof.

3. The defendant denies the allegations of paragraph 3 of the Amended Complaint.

4. The defendant denies the allegations of paragraph 4 of the Amended Complaint.

13 5. The defendant denies the allegations of paragraph 5 of the Amended Complaint.

6. The defendant denies the allegations of paragraph 6 of the Amended Complaint.

7. The defendant denies the allegations of paragraph 7 of the Amended Complaint.

8. The defendant denies the allegations of paragraph 8 of the Amended Complaint, and further denies that plaintiff should have judgment as therein prayed.

Peoria and Pekin Union Railway Company, a Corporation,
Defendant.
By E. E. Horton,
Its Attorney.

E. E. Horton,
1009 Alliance Life Bldg.,
Peoria, Illinois,
Attorney for Peoria and Pekin Union Railway Company, a Corporation, defendant.

Endorsed: Filed Feb. 5, 1942, G. W. Schwaner, Clerk.

14 And afterwards, to-wit: on the 17th day of February, A. D. 1942, there was filed in the office of the clerk of said court, a certain Plaintiff's Request for Admission of Facts, which said Request was and is in the words and figures following, to-wit: Filed Feb. 17, 1942.

15 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—P-133)

PLAINTIFF'S REQUEST FOR ADMISSION OF FACTS.

Comes now the plaintiff and requests the defendant to admit the truth of the following relevant matters necessary to establish the allegations in plaintiff's complaint:

1. Plaintiff is the duly appointed, qualified and acting

administratrix of the estate of Harold C. Tennant, deceased, under and by virtue of her appointment by the County Court, in probate, of the County of Tazewell, Illinois.

2. That on the 12th day of July, 1940, at or about 2:00 a. m., the aforesaid Harold C. Tennant was in the employ of the defendant in its yards at Peoria and East Peoria, Illinois, and had been employed by defendant for a number of years prior to said time and date.

3. That the said Harold C. Tennant, while thus employed by the defendant on the said 12th day of July, 1940, at about 2:00 a. m., was crushed and run over by cars being handled by defendant in its yards at East Peoria, Illinois.

4. That the said Harold C. Tennant was so crushed and injured that he died as a result of said injuries so received.

5. That at the time of said injury, and for years prior thereto, the defendant was a corporation duly organized and existing under and by virtue of law.

6. That said defendant corporation was engaged in the business of owning and operating a railway system, as a common carrier of goods and freight, for hire in interstate commerce between the various states of the United States of America.

7. That in furtherance of its business aforesaid, the defendant owned, operated, maintained and controlled railroad properties, lines, tracks, yards, trains, engines and cars, and particularly on and prior to the 12th day of July, 1940, owned and controlled the tracks in the Peoria and East Peoria, Illinois, Yards, and the track known as B-28 in said yards.

8. That on and for a long time prior to the 12th day of July, 1940, the said Harold C. Tennant, while in the service and employment of defendant, earned approximately One Hundred Eighty Dollars ($180.00) per month as a railroad switchman.

9. That a part of the duties of said Harold C. Tennant in said employment was in the furtherance of the interstate transportation business of the defendant.

10. That at the time of his aforesaid injury on the said 12th day of July, 1940, the said Harold C. Tennant was a member of a switching crew, the foreman of which was S. M. Harkless, the engineer of which was Thomas England, and the engine being used by said switching crew was Engine No. 200.

11. That shortly before his injury, the said switching crew, with the engine aforesaid, did deliver cars to the Toledo, Peoria and Western Railway Company.

12. That said cars thus delivered by said crew to said Toledo, Peoria and Western Railway Company contained a number of cars that originated out of or were destined beyond the State of Illinois.

13. That it was part of the regular duties of said crew to make a delivery of cars to the Toledo, Peoria and Western Railway Company every night shortly after commencing its duties at 11:00 p. m.

17 14. That said deliveries of said cars to said Toledo, Peoria and Western Railway Company usually contained cars moving in interstate commerce.

15. That the aforesaid crew, shortly before the injury and death of the said Harold C. Tennant, was coupling up the cars then on Track B-28 in the defendant's yards at East Peoria, Illinois.

16. That said train so located and coupled as aforesaid did contain cars moving in interstate commerce.

17. That the aforesaid crew and engine, shortly before the aforesaid injury and death of said Harold C. Tennant, did deliver the following cars to the said Toledo, Peoria and Western Railway Company:

Car No.	Initial	Taken at	Left at	Time	L or E	What Road's car	Marked to
76289	CBQ	300	2	11:59 p. m.	L	Q	2-C
20118	NWX	—	—	—	—	—	— R
94111	PFE	—	—	—	—	—	—
51158	GN	—	—	—	—	—	— B
408	CDLX	—	—	—	—	—	— T
187996	RI	—	—	—	—	—	— C
12129	NAD						
14408	PFE	—	—	—	X	—	— R
12020	ITC	—	—	—	L	—	— C
12135	—	—	—	—	—	—	—
2156	PSPX	—	—	—	—	—	— T
43164	CA	—	—	—	—	—	— C
29289	PFE	—	—	—	X	—	— R
91744	—	—	—	—	L	—	—
35892	—	—	—	—	—	—	—
92460	—	—	—	—	—	—	—
23648	—	—	—	—	—	—	—
6312	SHPX	—	—	—	—	—	— T
734	RPX	—	—	—	—	—	—
5039	EORX	—	—	—	X	—	—
478	C&ES	—	—	—	L	—	— B
274272	BO	—	—	—	X	—	—
99561	NYC	—	—	—	L	—	—
145196	SFE	—	—	—	—	—	—
6013	HTX	—	—	—	X	—	— T
12709	URL	—	—	—	L	—	— R
122770	SFE	—	—	—	—	—	— B
83038	WAB	—	—	—	—	—	—
21009	CNJ	—	—	—	—	—	—
96220	P	—	—	—	—	—	— R

Could be a PFE Ref.)

That prior to the said 12th day of July, 1940, the defendant did promulgate certain transportation rules
18 governing the movement of trains, engines and cars, and the employees employed by the defendant in connection therewith upon its properties, and did publish said rules in a small book entitled "Transportation Rules," dated January 1, 1929.

19. That among the rules thus promulgated was the

following rule found at page 33 of said rule book, and known as Rule 30:

"The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grade, and to prevent accident."

20. That the aforesaid rule was in force and effect on said 12th day of July, 1940, in defendant's aforesaid yards, at the time of the injury and death of the said Harold C. Tennant, and for years prior thereto.

21. That for the last three years prior to the aforesaid injury and the death of said Harold C. Tennant, the said Harold C. Tennant was paid by the defendant approximately One Hundred and Eighty Dollars ($180.00) per month for services rendered by said Harold C. Tennant to said defendant.

The defendant is notified that the truth of the foregoing relevant matters of fact will be deemed admitted unless denied by the defendant on or before February 26th, 1942, pursuant to the provisions of Rule No. 36 of the Federal Rules of Civil Procedure.

/s/ Mark D. Eagleton,
/s/ E. V. Champion,
Attorneys for Plaintiff.

We hereby acknowledge service of the foregoing Request for Admission of Facts on this 11th day of February, 1942.

/s/ E. E. Horton,
Attorney for Defendant.

Endorsed: Filed Feb. 17, 1942, G. W. Schwaner, Clerk.

19 And afterwards, to-wit: on the 17th day of February, A. D. 1942, there was filed in the office of the clerk of said court, a certain Defendant's Statement in Response to Plaintiff's Request for Admission of Facts, which said Statement was and is in the words and figures following, to-wit:

Filed Feb. 17, 1942.

20 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—P-133)

DEFENDANT'S STATEMENT IN RESPONSE TO PLAINTIFF'S REQUEST FOR ADMISSION OF FACTS.

Now comes the defendant, by its attorney, and makes its statement in response to plaintiff's request for admission of facts.

1. Defendant is unable to admit or deny the matter set forth in Paragraph 1 thereof because it is a matter peculiarly within the knowledge of the plaintiff and her attorneys as to whether she is the Administratrix of the estate of Harold C. Tennant; that they already know whether she has been so appointed; that the defendant has never examined the records of the courts of Illinois to ascertain whether she has been so appointed by any court of competent jurisdiction, nor was there any duty of the defendant so to do; that defendant does not know whether she has been so appointed.

2. Defendant admits the matters set forth in Paragraph 2 thereof.

3. Defendant is unable to admit or deny the matters set forth in Paragraph 3 thereof for the reason that defendant does not know, as a matter of fact, whether

21 Harold C. Tennant was run over by cars being handled by defendant; that no one saw the accident and there exists only circumstantial evidence as to the cause of Tennant's death; that the ultimate facts as stated by plaintiff are not known.

4. Defendant admits that Harold C. Tennant was found dead in its yards on July 12, 1940, but is unable to admit or deny that his death was caused by cars of this defendant for the reasons stated in response No. 3 hereof.

5. Defendant admits the matters set forth in paragraph 5 of plaintiff's request.

6. Defendant is unable to admit or deny the statement of fact contained in paragraph 6 thereof as the same is stated. Defendant admits that it is engaged in the business of owning and operating a railway system as a common carrier; that it furnishes terminal facilities for other railroads which are its tenants; that it performs switching

services for its tenants; that it conducts a local transportation business of its own between Peoria and Pekin, Illinois; but is unable to admit or deny whether it acts as a common carrier in interstate commerce between the various States because this is a conclusion of law based on the facts of its duties, and it is not a statement of fact.

7. Defendant admits that it owned, operated, maintained and controlled railroad properties, lines, tracks, yards, trains, engines and cars, and on and prior to July 12, 1940, owned and controlled the tracks in the Peoria and East Peoria yards, together with the track known as B-28, but says that it is a question of law as to whether said facilities in any particular case were used in interstate commerce.

Defendant denies the statement set forth in paragraph 8 of the request, that for a long time prior to July 12, 1940, the said Harold C. Tennant while in the employment of defendant, earned approximately $180.00 a month, but says that pursuant to an order for discovery entered by this court, the records showing the payments made to Tennant for a period of three years prior to his death will be exhibited to plaintiff on the day fixed by said order.

9. Defendant is unable to admit or deny the matters set forth in paragraph 9 thereof because defendant does not know as a matter of fact, at this time, the details of the duties performed by said Tennant; that pursuant to an order for discovery entered by this court, detailed records of some of the duties in which the said Tennant participated are being obtained and the same are to be submitted to plaintiff for inspection on the date specified in said order; and for the further reason that the matters set forth in paragraph 9 of plaintiff's request are not statements of fact, but a conclusion of law, which can only be determined by a court based upon established facts as to cars and the billing thereof, concerning which the said Tennant had any duties.

10. Defendant admits the facts stated in paragraph 10 of said request.

11. Defendant admits the statement of facts set forth in paragraph 11 of said request, except that such movement of said cars to the Toledo, Peoria & Western Railway Company was made a considerable time before the injury, and other switching movements intervened and

took place thereafter and before the body of Tennant was found.

12. Defendant is unable to admit or deny the statement appearing in paragraph 12 thereof because it does not know at the present time the billing of the cars in the particular cut described; but says that said billing is being ascertained pursuant to the order for discovery hitherto entered by this court, and that such records as the defendant keeps re-
23 lating thereto will be exhibited to the plaintiff on the day fixed by said order; and for the further reason that paragraph 12 of said request sets forth a conclusion of law and not a statement of fact.

13. Defendant is unable to admit or deny that it was part of the regular duties of said crew to make a delivery of cars to the Toledo, Peoria & Western Railway every night shortly after commencing its duties, because it does not know that such was the fact, but the defendant admits that the crew, of which Harkless was foreman, ordinarily did make such switch movements on or about the time of the alleged accident.

14. Defendant is unable to admit or deny the statement contained in paragraph 14 of said request, because at this time it does not know the cars and the billing thereof which were involved in said switch movements; that no time is fixed in said statement nor any particular movement specified; and for the further reason that the matter contained in said paragraph 14 is not a statement of fact but a conclusion of law.

15. Defendant admits the statement of facts set forth in paragraph 15 of said request.

16. Defendant is unable to admit or deny the statement set forth in paragraph 16 of said request for the reason that all records kept by this defendant having reference to the cars on Track B-28, at or about the time of the alleged accident, are now being obtained pursuant to an order for discovery entered by this court, which records, if any, will be exhibited to the plaintiff on the day fixed in said order; that the statement in paragraph 16, "that said train so located and coupled as aforesaid did contain cars moving in interstate commerce", is not a statement of fact but a conclusion of law to be determined by a court after the facts relating to the cars have been established.
24 17. Defendant is unable to admit or deny the statement set forth in paragraph 17 of said request because it does not now know that the cars listed in plaintiff's

statement are the cars which were delivered to Toledo, Peoria & Western Railway Company by said crew and engine before the death of Tennant; pursuant to the order for discovery entered by this court the defendant is collecting such records as it keeps with reference to said switch movement and will expect to be able to exhibit them, if any, to the plaintiff on the date fixed by said order.

18. Defendant admits the statement set forth in paragraph 18 of said request.

19. Defendant admits that said book contains a rule found on page 33 thereof, and known as Rule 30, which provides:

"The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grade, and to prevent accident.",

except that defendant denies that said rule was set forth in said book or promulgated by the defendant for the purpose of requiring the ringing of bells during yard switching, such as the said Tennant and the remainder of his crew were engaged in prior to his death, and except further that defendant denies said rule was promulgated for the purpose of protecting or warning yard switchmen engaged in duties similar to those of the said Tennant at or about the time of his death; and except further that defendant denies that said rule was promulgated for the purpose of requiring the ringing of any bell to warn switchmen on or about an engine of cars, the movements of which were well known and understood by said switchmen, and further denies that said rule required the ringing of a bell to warn such switchmen when it was not apparent and known that they were in a position of danger.

20. Defendant denies the statement in paragraph 20 of said request that the aforesaid rule was in force and effect on the 12th day of July, 1940, for any relevant purpose in this case; and defendant further denies that said rule was in force in defendant's East Peoria yard or upon Tract B-28 thereof, for the purpose of causing locomotive bells to be rung to warn switchmen employed in duties similar to those of Tennant just prior to his death; and defendant further denies that said rule was ever in force in said East Peoria Yards for the purpose of warning switchmen performing duties similar to those of Tennant, and who, like Tennant were presumed to know and understand the train movements, and who were under a duty of

looking out for their safety, and who were not known to be in a position of danger.

21. Defendant denies the statements set forth in paragraph 21 of the request that for the last three years prior to the death of the said Tennant, he was paid by the defendant approximately $180.00 a month for services rendered by said Tennant to said defendant.

Wherever in the above responses to the various requests of plaintiff for admission of facts, the defendant has admitted or denied the same, or has been unable to admit or deny the same, said defendant reserves the right to object to the relevancy of any such facts so stated in plaintiff's request.

Peoria and Pekin Union Railway Company, a Corporation,
By /s/ E. E. Horton,
Its Attorney.

Sworn to and subscribed before me this 17th day of February, A. D. 1942.

/s/ Anna M. Stephens,
(Seal) *Notary Public.*

We hereby acknowledge service of the foregoing response to plaintiff's request for admission of facts on this 17 day of February, 1942.

/s/ Mark K. Eagleton,
X.
/s/ E. V. Champion,
Attorneys for Plaintiff.

Endorsed: Filed Feb. 17, 1942, G. W. Schwaner, Clerk.

26 And afterwards, to-wit: on the 30th day of March, A. D. 1942, there was filed in the office of the clerk of said court, a certain Plaintiff's Request for Admission of Facts, which said Request was and is in the words and figures following, to-wit:

27 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Mar. 30, 1942.

(Caption—P-133)

PLAINTIFF'S REQUEST FOR ADMISSION OF FACTS.

Comes now the plaintiff and requests the defendant to admit the truth of the following relevant matters necessary to establish the allegations in plaintiff's complaint:

1. That defendant, as a common carrier of goods and freight, did, on the 12th day of July, 1940, and for a long time prior thereto, handle cars in its yards in Peoria and East Peoria, Illinois, some of which cars originated at points outside of the State of Illinois and other of which cars were destined to points beyond the State of Illinois.

2. That the deceased, Harold C. Tennant, on July 9, 10, 11 and 12, 1940, was employed by the defendant, working as a member of a switching crew, the foreman of which crew was S. M. Harkless, and that said Harold C. Tennant and the said crew were required on said days, as a part of their duties, to handle and move cars, some of which originated at points outside of the State of Illinois and other of which cars were destined to points outside the State of Illinois.

3. That within a few hours prior to the death of said Harold C. Tennant on the 12th day of July, 1940, the aforesaid crew did deliver to the Toledo, Peoria & Western Railway Company a group of approximately thirty (30) cars, and that some of said cars originated at points outside the State of Illinois and other of said cars were

28 destined to points outside the State of Illinois.

4. That shortly prior to the death of said Harold C. Tennant, he was working with the aforesaid crew, coupling up a track in defendant's yards at East Peoria, Illinois, known as Track B-28, and that said track then and there contained the following cars:

Car No.	Initial
38271	B. & O.
163121	I. C.
87068	N. K. P.
50248	C. & N.
24522	C. & A.
2897	C. I. Z.
26980	N. Y. C.
26968	.....
43401	C. & N.
24539	L. N.
112	Dup. X.
360470	St. P.
47019	C. & N. W.
42631	.....
47507	.....
43077	.....
9160	N. K. P.
2131	E. R. D. X.
49613	S. P.
65471	G. N.

5. That some of the aforesaid cars originated at points outside the State of Illinois and some of said cars were destined to points outside the State of Illinois.

The defendant is notified that the truth of the foregoing relevant matters of fact will be deemed admitted unless denied by the defendant on or before April 11th, 1942, pursuant to the provisions of Rule No. 36 of the Federal Rules of Civil Procedure.

/s/ Mark D. Eagleton,
/s/ E. V. Champion,
Attorneys for Plaintiff.

We hereby acknowledge service of the foregoing Request for Admission of Facts on this 30th day of March, 1942.

/s/ E. E. Horton,
Attorney for Defendant.

Endorsed: Filed Mar. 30, 1942. G. W. Schwaner, Clerk.

30 And afterwards, to-wit: on the 10th day of April, A. D. 1942, there was filed in the office of the clerk of said court, a certain Response of Defendant to Plaintiff's Second Request for Admission of Facts, which said Response was and is in the words and figures following, to-wit: Filed Apr. 10, 1942.

31 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—P-133)

RESPONSE OF DEFENDANT TO PLAINTIFF'S SECOND REQUEST FOR ADMISSION OF FACTS.

Now comes the defendant and responds to plaintiff's second request for admission of facts, notice of which was served on March 30, 1942, as follows:

1. Defendant admits the statement set forth in paragraph 1 thereof.
2. Defendant admits the statement set forth in paragraph 2 thereof.
3. Defendant admits the statement set forth in paragraph 3 thereof.
4. Defendant admits the statement set forth in paragraph 4 thereof.
5. Defendant admits the statement set forth in paragraph 5 thereof.
6. The defendant reserves the right to object to the relevancy of any such facts so stated in plaintiff's request.

Peoria and Pekin Union Railway Company, a Corporation,
Defendant.
By /s/ E. E. Horton,
Its Attorney.

32 We hereby acknowledge service of the Response of Defendant to Plaintiff's Second Request for Admission of Facts this 10th day of April, A. D. 1942.

/s/ Mark D. Eagleton.
/s/ E. V. Champion,
Attorneys for Plaintiff.

Endorsed: Filed Apr. 10, 1942. G. W. Schwaner, Clerk.

Filed Apr. 14, 1942.

33 And afterwards, to-wit: on the 14th day of April, A. D. 1942, there was filed in the office of the clerk of said court, a certain Defendant's Request for Admission of Facts, which said Request was and is in the words and figures following, to-wit:

34 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-133) * *

DEFENDANT'S REQUEST FOR ADMISSION OF FACTS.

Now comes the defendant and requests the plaintiff to admit the truth of the following relevant matters necessary in the defense of the case;

1. Harold C. Tennant was forn June 21; 1906.

2. Harold C. Tennant was first employed as a switchman by defendant on August 1, 1936. On June 14, 1937 he was cut off board account slack business. On June 20, 1937 he obtained employment in the Engineering Department of defendant, resigning four days later. On August 23, 1937 he resumed service as switchman for defendant. On March 11, 1938 he was granted thirty days leave of absence. On April 14, 1938 he was furloughed account slack business. On August 30, 1938 he resumed service as switchman for defendant. On June 1, 1939 he was furloughed on account of slack business. On September 13, 1939 he resumed service as switchman, in which service he continued until his death on July 12, 1940.

3. The following is a statement showing the gross earnings, deductions and net earnings for Harold C. Tennant, while an employee of Peoria and Pekin Union Railway Company, for the period of three years prior to his death, together with the averages per year:

35

1937	Gross Earnings	Deductions	Net Earnings
July	.....	.....	.....
August	$ 55.03	$ 1.51	$ 53.52
September	167.58	4.61	162.97
October	220.97	6.08	214.89
November	209.17	5.75	203.42
December	178.82	4.91	173.91
1938			
January	74.13	2.04	72.09
February	42.91	1.18	41.73
March	.....	.....	.....
April	.....	.....	.....
May	.....	.....	.....
June	.....	.....	.....
July	.....	.....	.....
August	.....	.....	.....
September	159.20	4.38	154.82
October	203.77	5.60	198.17
November	178.27	4.90	173.37
December	190.62	5.24	185.38
1939			
January	140.99	3.88	137.11
February	182.47	5.02	177.45
March	141.43	3.89	137.54
April	140.32	3.85	136.47
May	21.95	.60	21.35
June	.....	.....	.....
July	.....	.....	.....
August	.....	.....	.....
September	133.05	3.65	129.40
October	247.02	6.79	240.23
November	184.23	5.07	179.16
December	114.51	3.15	111.36
1940			
January	222.63	6.68	215.95
February	173.75	5.21	168.54
March	203.98	6.12	197.86
April	189.41	5.68	183.73
May	122.78	3.68	119.10
June	171.98	5.16	166.82
July	66.52	2.00	64.52
Grand Total	$4137.49	$ 116.63	$4020.86
Average Per Year	$1379.16	$ 38.88	$1340.28

4. Deductions made from the wages of Harold C. Tennant as shown above, are in accordance with the provisions of the Carriers Taxing Act, effective January 1, 1937. A deduction of 2¼% was made from his wages for the years 1937, 1938 and 1939, and a deduction of 3% for the year 1940.

36 The plaintiff is notified that the truth of the foregoing relevant matters of fact will be deemed admitted unless denied by the plaintiff on or before April 22, 1942, pursuant to the provisions of Rule No. 36 of the Federal rules of civil procedure.

/s/ E. E. Horton.
Attorney for Defendant.

We hereby acknowledge service of the foregoing Request for Admission of Facts, on the 9th day of April, A. D. 1942.

/s/ Mark D. Eagleton,
/s/ E. V. Champion,
Attorneys for Plaintiff.

Endorsed: Filed Apr. 14, 1942. G. W. Schwaner, Clerk.

Filed Apr. 13, 1942.

37 And afterwards, to-wit: on the 13th day of April, A. D. 1942, there was filed in the office of the clerk of said court, a certain Plaintiff's Statement in Response to Defendant's Request for Admission of Facts, which said Statement was and is in the words and figures following, to-wit:

38 In the District Court of the United States.

(Caption—P-133)

PLAINTIFF'S STATEMENT IN RESPONSE TO DEFENDANT'S REQUEST FOR ADMISSION OF FACTS.

Comes now the plaintiff, by her attorneys, and makes this statement in response to defendant's request for admission of facts which was served upon plaintiff's counsel April 9, 1942.

1. Plaintiff admits the facts contained in paragraph one of said request.

2. Plaintiff admits the facts contained in paragraph two of said request.

3. Plaintiff admits the facts contained in paragraph three of said request.

4. Plaintiff admits the facts contained in paragraph four of said request.

Mark D. Eagleton,
Attorney for Plaintiff.

Subscribed and sworn to before me this 10th day of April, 1942.

F. R. Barrett,
(Seal) *Notary Public.*

My commission expires Sept. 4, 1943.

39 I hereby acknowledge service of the foregoing Statement in Response to Defendant's Request for Admission of Facts on this 13th day of April, 1942.

/s/ E. E. Horton,
Attorney for Defendant.

Endorsed: Filed April 13, 1942, G. W. Schwaner, Clerk.

40 And afterwards, to-wit: on the 3rd day of September, A. D. 1942, there was filed in the office of the clerk of said court, a certain Transcript of Evidence, which said Transcript of Evidence was and is in the words and figures following, to-wit:

41 In the District Court of the United States.

(Caption—P-133)

Appearances:

Mark D. Eagleton, Esq., St. Louis, Mo. and Champion, Gaskins & Lee, By E. V. Champion, Esq., Peoria, Ill., Appearing for the plaintiff.

E. E. Horton, Esq., Peoria, Ill., Appearing for the defendant.

Be It Remembered And Certified that heretofore, to wit, on the 4th, 5th, 6th and 7th days of May, A. D. 1942, they being regular days of April, 1942, Term of said Court aforesaid, before the Honorable J. Leroy Adair, one of the Judges of said Court, the foregoing cause come on

for trial by jury, and the following proceedings were had, to wit:

47 2 o'clock P. M.
May 4, 1942.

The Court: In Mary Tennant *vs.* Peoria & Pekin Union Railway Company, number P-133, is the plaintiff ready?
Mr. Champion: The plaintiff is ready.
The Court: Is the defendant ready?
Mr. Horton: The defendant is ready.
The Court: Call the jury.
(Jury selected and duly sworn to try the issues.)
(By direction, opening statements not transcribed.)

MARY TENNANT, the plaintiff, appearing in her own behalf, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Eagleton.

Q. Mrs. Tennant, when you answer questions if you will, please, speak as loud as you can so that every member of the jury panel can hear you, so His Honor can hear you, and the respective counsel can hear you.
What is your name, please?
A. Mary Tennant.
Q. How old are you, Mrs. Tennant?
A. Twenty-five.
Q. Where do you live?
A. 444 Zessin Street, Creve Coeur, Illinois.
48 Q. Creve Coeur, Illinois, is just on the outskirts of Peoria, is it?
A. East Peoria.
Q. And how long have you lived in this vicinity of Peoria, Illinois, and East Peoria?
A. About eight years now.
Q. Eight years?
A. Yes, sir.
Q. Where were you living?
A. Creston, Iowa.
Q. That is C-r-e-s-t-o-n?
A. That's right.

Q. Is that the same town from which your husband came?

A. Yes.

Q. What was his age at the time of his death?

A. Thirty-four.

Q. What was his health prior to his death?

A. Good.

Q. What were his habits?

A. Beg your pardon?

Q. What were his habits? Was he a man of good habits?

A. Yes.

Mr. Horton: I object to that. It calls for a conclusion. Let the witness state the facts.

The Court: Yes, I think she can state the facts.

Q. Mrs. Tennant, did your husband live with you and your baby that was born of that marriage—

A. Yes, sir.

Q. —here in Peoria up to the time of his death?

A. Yes, sir.

49 Q. When was the baby born, please?

A. July 13, 1935.

Q. And when were you married?

A. April 14, 1934.

Q. That was about fifteen months prior to the time the baby was born?

A. Yes, sir.

Q. How old was the baby at the time of the death of Mr. Tennant?

A. She was four years old, five the next day.

Q. The next day was her birthday?

A. Yes.

Q. She is the little girl that is in court here?

A. Yes, sir.

Q. She is how old now?

A. She will be seven in July.

Q. Now, when he was employed by the railroad company, what did he do with the money that he received from the railroad company as earnings with reference to how he handled it with you and members of his family?

A. He gave it to me, and I paid bills and bought our groceries and that.

Q. In other words, he gave it to you, the entire sum he earned, and you ran your household on that, did you?

A. Yes, sir.

Q. Did he work steadily?

A. Well, yes, he did. If he wasn't working for the railroad, he did other things.

Q. What other things would he do?

A. He was engaged in a distillery, could do plumbing, carpentering, farming.

50 Q. When he would be off of the board for the railroad company, would he engage in these other occupations you have mentioned?

A. Yes, sir.

Q. What would you say the minimum was he would turn over to you and contributions while he was off the board?

A. $25.00.

Q. A week?

A. Yes, sir.

Mr. Eagleton: There had been admitted in evidence, in pursuance of admissions of the defendant, some of the earnings of this man. I'll read.

Q. Mrs. Tennant, pursuant to admissions filed on behalf of the defendant, there have been read in here certain earnings made by your husband. Particularly addressing myself to the last month—last ten months before he was injured, which would be beginning with September of 1939, I'll read to you the amounts designated by the defendant from its payroll which were earned by him, and ask you if they accord with your recollection of the amounts turned over to you: September, 1939, $129.40; October, $240.23; November, $179.16; December, $111.36; January, $215.95; February, $168.54; March, $197.86; April, $183.73; May, $119.10; June, $166.82. Are those amounts I have mentioned here the amounts that were turned over to you—

A. Yes, sir.

Q. —for the purposes you have mentioned?

A. Yes, sir.

Q. With reference to going to places of amusement, did you go to places of amusement with your husband?

A. Well, we did; if we went—but very seldom we went.

51 Q. Very seldom you went to places of amusement?

A. Yes.

Q. Due to what reason?

A. He was steadily employed all the time, and we were saving our money for our home.

Q. That home you speak of, is that the same home in which you now reside—

A. Yes.

Q. —today in Creve Coeur, Illinois?

A. Yes.

Q. When you started building that home, you started a garage?

A. Yes, sir.

Q. And lived there first?

A. Yes.

Q. And moved to the basement?

A. Yes, sir.

Q. And moved from the basement upstairs when the frame work was completed?

A. Yes.

Q. Your house was in course of being completed at the time of his death?

A. Yes, sir.

Q. The frame work superstructure was already up?

A. Yes.

Q. Did he do much of that work himself?

A. He did part of it, yes.

Q. Did he draw the plans for it himself?

A. He did.

Q. I believe Mr. Horton asked you to evaluate the
52 house, and you told him in a deposition it was worth about $4000.00 or $4500.00, is that right?

A. Yes, sir.

Q. Even while he was employed by the railroad company; and even when working steadily, did he do some of these other jobs you have mentioned in order to earn?

A. He did.

Q. To what extent did he earn, so far as maintaining himself was concerned?

A. He did odd jobs so that he could buy his own clothes and stuff like that.

Q. Did he do that?

A. He did.

Q. You were not present when he was killed, of course?

A. I was not.

Q. The last time you saw him alive was on the evening preceding his death, which would be July 11, 1940, would it?

A. Yes, sir.

Q. What time did he go to work that night?

A. 10:30 when he left the house.

Q. He would work from 11 at night to 7 in the morning?
A. Yes, sir.
Q. That was his normal watch, is that right?
A. Yes, sir.
Q. Was he in good health when he left the house?
A. Yes, sir.
Q. I will hand you here (I will have the reporter mark this "Plaintiff's Exhibit A") a book of rules marked "Plaintiff's Exhibit A", which bears the name of
53 H. C. Tennant, book number 438, which is a book of transportation rules issued by the defendant, Peoria and Pekin Union Railway Company, dated January 1, 1929, given to him by the company.
A. Yes, sir.
Q. With reference to his seniority, do you know where he was with reference to seniority?
(No answer.)
Mr. Eagleton: Did you bring that seniority list with you? Bonner was the man in back of him, was he not?
Mr. Horton: I think so, but I am not one of the witnesses.
Mr. Eagleton: We asked the defendant to produce a statement showing the earnings of Mr. Bonner.
Now, in order that we may have that, I ask you now, Mr. Horton, if you have the earnings of Mr. Bonner here at hand and the earnings of the man next under him, if that was not Mr. Bonner. Have you those?
Mr. Horton: I have been advised by the superintendent of the railroad that it is impossible to comply with your request.
You asked for a copy of the book of rules. There is a copy of the book of rules.
This is a matter of evidence. I don't know whether you want to have this argued before the jury.
The Court: What have you asked for?
Mr. Eagleton: It was an order to produce, if the court please, records showing the earnings of Mr. Bonner or the man who took his place, showing what he earned from the date of the accident down to date, showing
54 the capacity to earn.
The Court: The jury may retire.
(By direction argument out of the presence of the jury not transcribed.)
The Court: It is advisory perhaps, but too dangerous. You can show by secondary evidence Bonner was next in

the line of succession, that he stepped into his shoes upon the death of Tennant, and that since Tennant's death Bonner has been entitled to work a certain number of hours a day.

Don't put it to the jury as the amount of money Bonner received. It seems that is prejudicial. Alll Bonner's record would show to me if I was on the jury was the fact Tennant could have done it if he had wanted. I think you are entitled to show that. It must be shown Bonner was next in line.

I guess you haven't shown that by the pleadings?

Mr. Eagleton: No.

The Court: And that since the death of Tennant he has been entitled to work so many days a week.

Mr. Eagleton: And if Bonner testifies I assume we can have a subpoena duces tecum to refute any statement he may make in regard to the steadiness of employment.

The Court: You can have that.

We will be in recess five minutes.

(Recess.)

(Jury returns to court room.)

The Court: You may proceed.

Q. Mrs. Tennant, I will ask you, with reference to Mr. Tennant, during his lifetime did he own an automobile?

A. Yes, sir.

Q. And did he take you and the baby out in the automobile frequently?

A. Yes, sir.

Q. Whenever he had the time and was not working?

A. Yes, sir.

Q. The rest of the time when he was not at work or not riding with you, he would spend at home?

A. Yes, sir.

Mr. Eagleton: I believe that's all.

Cross-Examination by Mr. Horton.

Q. Mrs. Tennant, I believe you said you married Harold C. Tennant on April 14, 1940.

A. 1934. 1934.

Q. 1934?

A. Yes, sir.

Q. Now, he didn't go to work for the Peoria and Pekin Union Railway Company until August 1, 1936, did he?

A. I believe that's right, yes, sir.
Q. And at that time where were you living with him?
A. At our present address.
Q. And that is in the house that you say he was building?
A. We were living in our garage at that time.
Q. But the garage was on the same lot that you now occupy—
A. Yes, sir.
Q. —in the village of Creve Coeur?
A. Yes, sir.
56 Q. Did he pay for that lot?
A. He did, yes, sir.
Q. And after he built the garage on it, you and Mr. Tennant lived in it, did you?
A. Yes, sir.
Q. He used it as his dwelling place and his shelter?
A. As well as mine, yes, sir.
Q. As well as yours?
A. Yes, sir.
Q. And you say that he would turn over his pay check?
A. Yes, sir.
Q. Now, Mr. Eagleton read off some specific amounts of pay for different months which I believe began in September, 1939, and continued until July, 1940, and you said he turned those over to you.
A. Yes, sir.
Q. How do you remember the amounts of those checks so well?
A. Because he kept track himself.
Q. Do you know now how much, for example, he gave you in the month of October, 1939?
A. Not right offhand, no.
Q. How much was it?
A. I don't know right offhand.
Q. How much did he give you on the month of January, 1940?
A. That I do not know.
Q. So that, when you answered Mr. Eagleton's questions, you really did not know what your husband was giving you, did you?
A. I knew I was getting every cent of it, yes, sir.
Q. Well, do you know what he gave you in June, 1940?

57 A. It was pretty close to $200.00, around that.

Q. Well, as a matter of fact, Mr. Eagleton asked you if he didn't give you $166.82 that month, and you said yes. Is that true?

Mr. Eagleton: I wish to object. I didn't ask that question. I asked if the amounts paid by the defendant were in accordance with her recollection of the amounts.

The Court: That is a question for the jury.

This is cross-examination.

Read the question, Miss Reporter.

(Question read by reporter.)

A. Yes, sir.

Q. That is a little different than $200.00, isn't it?

A. Yes, sir.

Q. Now, there were periods of time between July, 1937, and July, 1940, when Harold C. Tennant didn't work for the railroad at all; isn't that the fact?

A. Yes, sir.

Q. Sometimes it would be as much as six months?

A. Yes, sir.

Q. And sometimes the annual—Sometimes the monthly earnings were pretty small, were they not?

A. No, he usually brought in about $25.00 a week and gave it to me.

Q. Well, it has been admitted in this case that in the month of February, 1938, his net earnings were only $41.73.

A. He did odd jobs in between those times.

Q. I say do you deny that that was correct?

A. No, sir.

Q. And in the month of January, 1938, the ad-
58 mitted facts are that his net earnings were only $72.09. Do you say that that was wrong?

A. No, not for the railroad.

Q. And in the month of May, 1939, his net earnings are shown by the admission of facts to be only $21.35. Do you say that that was wrong? Do you?

A. It seems to me like he had more than that coming.

Q. As a matter of fact, you don't know what his earnings were each month, do you?

A. No, I don't remember exactly. I haven't them memorized.

Q. Now, of these pay checks, with the proceeds of the pay checks that were turned over to you, what did you do with it?

A. I bought groceries for us, paid our lights and our water, and the rest I put away for our future home.

Q. Groceries?

A. Bought the necessary clothes for our child.

Q. Water? You bought water?

A. Yes, sir.

Q. You paid light bills?

A. Yes, sir.

Q. You paid for clothing for the child?

A. Yes, sir.

Q. Of the groceries that were purchased, some proportion of them were for Harold C. Tennant, were they not?

A. Yes, sir.

Q. What would that proportion be? How much of the groceries would he eat?

A. Not more than half.

Q. How's that?

59 A. Not more than half.

Q. Would you say it would be about half?

A. Approximately.

Q. I am trying to find out from you, Mrs. Tennant, what portion of Mr. Tennant's earnings were expended upon his own livelihood and shelter, and also what portion of his earnings were contributed to you for your shelter and livelihood. What proportion of the water was used by Mr. Tennant and what proportion by you?

A. Well, we bought that monthly. It was the same amount every month, regardless of the amount we used.

Q. Did he use about 50% of the water?

A. No, I wouldn't say so.

Q. How much?

A. I used more than he did. He probably used a fourth of it.

Q. A fourth of it? And on the lights, what was the proportion there? I suppose he used lights when he came home at night, didn't he?

A. For a few minutes, yes.

Q. And a proportion of the cost of lights went for his benefit, didn't they?

A. Yes, sir.

Q. He bought clothes, didn't he?

A. Yes, sir.

Q. From his earnings?

A. From his earnings outside of the railroad. He did odd jobs to get—

Q. Did you pay for his clothes?

A. No.

Q. Did he pay for those himself?

60 A. Yes, sir.

Q. Then he didn't turn all his money over to you, is that right?

A. Well, he did turn his money over to me. It was true from odd jobs that he bought his clothes.

Q. He only bought his clothing out of odd jobs, did he?

A. Yes.

Q. He had to buy clothes for his work as a switchman, did he not?

A. Yes, sir.

Q. And what kind of clothes did that call for?

A. Rain clothes.

Q. What?

A. Rain clothes and shoes, hat, overcoats.

Q. Heavy clothes during the winter time?

A. Yes, sir.

Q. Overalls?

A. Yes, sir.

Q. Heavy shoes?

A. Well, they were shoes; I don't know how heavy they were.

Q. And in the summer time rain clothes to wear over his other clothes?

A. Yes, sir.

Q. And in the winter time heavy clothes which would permit him to work outdoors—

A. Yes, sir.

Q. —in all kinds of weather? How much do you think that outfit of clothes would cost him a year?

A. Well, being not hard on his clothes, I wouldn't know exactly.

Q. Would he pay for those clothes before he would turn any money over to you?

A. No, sir.

61 Q. Then did you pay for those clothes?

A. He paid for them. He asked me if he could have the amount of money, and I gave it to him.

Q. How much a year do you think those clothes cost him? Just roughly and approximately.

A. Oh, I imagine around a hundred dollars, that is with his suits he bought, too.

Q. Now, after he would come home he would dress up, would he not?

A. No, sir.

Q. What?

A. No, sir.

Q. Didn't he have any nice suits of clothes he could put on in the evenings?

A. Yes, he had good suits, but he didn't dress up when he come home.

Q. He had nice suits he could wear if he wanted to dress up?

A. Yes, sir.

Q. How many suits of clothes would he buy for himself a year?

A. Oh, approximately one or two.

Q. And what would those cost?

A. Not more than $25.00.

Q. Apiece?

A. I imagine.

Q. And he had nice shoes, too, didn't he?

A. One pair of shoes, yes.

Q. How's that?

A. One pair of shoes, yes.

Q. Did he buy about one pair of shoes a year? Nice shoes?

A. He didn't buy them that often. He only had about three pair all the time we were married.

62 Q. How much would they cost him apiece?

A. Around two and a half, I suppose.

Q. He bought an automobile, didn't he, while you were married?

A. Yes, sir.

Q. What kind was it?

A. A Dodge.

Q. When did he buy it?

A. It was a 1937.

Q. Did he buy any more cars after that?

A. No, sir.

Q. He used that car to go to work in, didn't he?

A. Yes, sir.

Q. Now, from 1937 on down until the time of his death,

Mr. Tennant was working on this house in which you now live, wasn't he?

A. Yes, sir.

Q. And he was paying for materials and supplies to go into the house?

A. Yes, sir.

Q. And I believe you testified that the house finally cost him about $4500.00?

A. Yes, sir.

Q. And he used that house throughout this entire period from 1937 to the time of his death to live in himself, didn't he?

A. Not the house. We was living in the garage, and then from the garage to the basement, but we were living on that property all the time. We did not have the house completed.

Q. Wasn't the house pretty well completed at the time of his death?

A. Yes, the framework was up. We were living in the basement.

Q. In the basement of the house?

63 A. Yes.

Q. And he was using that as his shelter?

A. Yes, sir.

Q. And he was using his earnings for his food and his clothing, and would you say that about 50% of his earnings were going for his own shelter and his food and his clothing?

A. No, sir.

Q. Well, how much?

A. I would say 25% of it.

Q. 25%. Who was getting the other 75%?

A. I was.

Q. How were you spending the money?

A. Spending it for our house, material.

Q. The money was going for the house? I asked you that question. I meant to include in my question whether 50% of his earnings were not going for his own benefit in the cost of the house and in the cost of food and the light and the water and the automobile during the period from 1937 to July 10, 1940.

A. You mean for himself. Is that the idea you mean?

Q. For his own use, yes.

A. I used the house as much as he did.

Q. That is right. He used it as much as you did, didn't he?

A. Sure.

Q. So that it was about fifty-fifty, wasn't it?

A. I imagine so.

Q. And your benefits from his earnings and the little girl's came to about 50% of his earnings, isn't that approximately right?

Mr. Eagleton: I object, if the court please.

It is not in accord with what the witness stated. It
64 is a misquotation of the witness.

The Court: I think she has answered the question. The objection will be sustained.

Q. Now, there was a period of six months commencing in March, 1938, and ending the first of September, 1938, where he didn't work for the railroad at all. Do you know what he was doing then?

A. He—Yes, he was engaged in carpentering and plumbing, carpenter work and plumbing.

Q. Who did he work for?

A. He took contracts upon himself. He wasn't working for anyone in particular.

Q. He took contract work himself, did he,—

A. Yes, sir.

Q. —during that period? How much of that time was he employed?

A. He was employed all the time.

Q. And I believe that you said that he gave you $25.00 a week during that period?

A. Yes, sir, that's what he give to me.

Q. Well, that was all he made, wasn't it?

A. No, sir.

Q. I believe you said he turned over the money to you. Did he or did he not turn over the money to you, all of it?

A. Yes, sir.

Q. And it was $25.00 a week, is that right?

A. Yes, sir, approximately that.

Q. Same amount each week?

A. Yes, sir.

Q. No change in the amounts that he gave you, is that right?

A. No, sir.

65 Q. Can you give the names of any persons that he worked for during that period?

A. He worked with George—
Q. That he worked for.
A. In the six months he was off? He did contracting work all that summer himself.
Q. Can you give the name of any person that he did a contract job for?
A. Not right offhand I can't.
The Court: Speak louder.
A. Not right offhand I can't.
Q. Are you working now, Mrs. Tennant?
A. Yes, sir.
Q. Where do you work?
A. Hiram Walker Distillery.
Q. What kind of work do you do down there?
A. I work in the bottling department.
Q. How much are you paid down there?
A. Twenty-five a week.
Mr. Horton: I believe that's all.

Redirect Examination by Mr. Eagleton.

Q. Mrs. Tennant, with reference to groceries, I don't know whether Mr. Horton asked you what amount. I believe he did in the deposition ask how much you spent for groceries per week. How much was it you said?
A. Around $10.00.
Q. When you are cooking for three people when
66 your husband was alive (he is dead now, you are cooking for two people), although he may have consumed half of the cooked food, does that mean your present grocery bill for the two would only be half?
A. No.
Q. Does it take almost the same amount to cook for two that it did for three?
A. It does.
Q. With reference to lights, does the lights for that house—does it cost the same amount with his presence or when he is gone?
A. Costs just the same.
Q. With reference to the water, Mr. Horton—you spoke that you paid that by the month, by license or tax, regardless of the fact he drank two glasses or ten.
A. That's right.

Q. Or when you used the water for washing clothes or bathing the baby or anything else?

A. Yes.

Q. The same thing is true of shelter. You only had one roof on the house, I presume?

A. Yes, sir.

Q. You don't divide the roof in parts, one part over him and one part over you?

A. Yes, sir.

Mr. Eagleton: That's all.

Mr. Horton: I forgot to ask one question on cross I want to ask.

The Court: You may inquire.

67 *Cross-Examination Resumed by Mr. Horton.*

Q. Your husband was working on a shift that commenced at 11 o'clock at night, was he not?

A. Yes, sir.

Q. And worked until 7 in the morning?

A. Yes, sir.

Q. What times would he have to work on the house?

A. On that shift he didn't have much time.

Q. Did he do any work on the house during that period?

A. No, sir.

Q. What would he do after he came home at 7 o'clock in the morning?

A. He went right to bed.

Q. Would he eat anything first?

A. Sometimes he would, and sometimes he wouldn't.

Q. He would go to bed. How long would he sleep?

A. Until 2:30.

Q. Then he would get up, would he?

A. Yes.

Q. Then would you feed him?

A. Yes, sir.

Q. Then what did he do between that time and 11 o'clock at night?

A. Well, he would sit down and read the paper, and we would visit, and he went back to bed around 6 o'clock in the evening and slept to the time he used to go to work.

Q. Now, Mrs. Tennant, he worked on the 11 o'clock shift for quite a while, didn't he?

A. No, only two or three days.

Q. Well, I will ask you if he didn't work on the 11 o'clock shift for fifteen or twenty days in the month of May,
68 1940. Did he or didn't he?

A. That I don't remember.

Q. You don't remember? It's possible he could have worked on it, isn't it?

A. Yes, on the board rotation.

Q. Do you want to tell the jury during that period of time he did not work on the house?

A. He helped out, yes.

Q. Now, there were several days just before his death that he worked on this same shift also, weren't there?

A. Yes, from Tuesday to Friday.

The Court: I can't hear the witness.

A. From Tuesday to Friday.

Q. He worked on the house during his rest period on those days, didn't he?

A. No, sir.

Q. Do you want to say definitely that he didn't work on the house on July 9, 10 and 11 of 1940?

A. Yes, sir.

Q. Isn't a fact, Mrs. Tennant, that during his rest period just before the work in which he was killed he worked almost all of his rest period on that house?

A. No, sir.

Q. And that, as a result of working during his rest period, he was very tired that night?

A. No, sir.

Q. Getting back to the food: He ate three meals a day which you prepared for him, didn't he?

A. Yes, sir.

69 Q. He was a healthy man, was he?

A. Yes, sir.

Q. And had a good appetite, did he?

A. Well, for two meals he did. At the breakfast there wasn't any real appetite.

Q. Isn't it a fact he would eat more food than you and the little girl put together?

A. No.

Q. It isn't true?

A. No.

Q. He ate as much, didn't he?

A. Approximately.

Mr. Horton: I think that's all.
The Court: Is that all with this witness?

Redirect Examination by Mr. Eagleton.

Q. Mrs. Tennant, how do you recall, if you have any method of recalling, that the last few days prior to his death he was or was not working on the house?
A. He didn't have material to work with.
Mr. Eagleton: That's all.
The Court: Is that all? I think we will stop at this moment.

Trial Adjourned at 4:45 o'clock P. M.

70 May 5, 1942.

Trial Resumed at 10 o'clock A. M.
Appearances: Same as before.

KENNEY E. WILLIAMSON, called on behalf of the plaintiff, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Eagleton.

Q. Will you please state your full name to the court and jury?
A. Kenney E. Williamson.
Q. What is your business?
A. I am general agent for the Massachusetts Mutual Life Insurance Company.
Q. Here in Peoria?
A. Yes.
Q. Mr. Williamson, in your business do you have occasion to use as a part of your routine in the insurance business the American Experience Tables of Mortality?
A. Yes, sir.
Q. Have you that table with you?
A. Yes.
Q. Would you mind letting me have it, please, so I can have it identified?
A. (Witness complies.)

Q. Mr. Williamson, will you take the American Ex-
71 perience Tables of Mortality, which has now been marked "Plaintiff's Exhibit B", and state what the experience is shown as has been set out for one thirty-six years of age, a man thirty-six years of age?

Mr. Horton: I object to the question unless the exhibit is placed in evidence.

Mr. Eagleton: It will be placed in evidence.

The Court: Does the question show the experience about which you are asking?

Mr. Eagleton: Yes. I think it should be called to his attention.

The Court: Sustained on the ground the exhibit is the best evidence.

Mr. Eagleton: I offer the exhibit in evidence, if the court please, the American Experience Tables of Mortality, and I think the record—I have in the record what the table shows.

May I state that, in the record, either outside the presence of the jury,—

Mr. Horton: I want to object to the admission of the exhibit in evidence since there is insufficient foundation. There has been no explanation as to who prepared the exhibit, or what it purports to contain, and there is no showing that it is relevant to the case of Harold C. Tennant, a switchman in this case.

The Court: Let me see the exhibit. (Examines same.) I think you should show how it is made and so forth and so on.

Q. Mr. Williamson, is this the experience table that is standard and approved by various life insurance com-
72 panies, based upon an experience of many years with reference to the expectancy in the acturial figures with reference to deaths and life expectancy?

Mr. Horton: I object to that question as being leading and suggestive.

The Court: The objection is overruled. He may answer.

A. Yes.

Mr. Eagleton: I now offer the exhibit, if the court please.

The Court: Same objection?

Mr. Horton: I make the same objection, and also want to make the objection that there is no showing here, whatever it contains, it would have any bearing upon the life expectancy of Harold C. Tennant, a switchman.

The Court: I think I understand your point, but that is a matter of defense, as the court sees it, proof that it isn't applicable.

The objection will be overruled, and it may be admitted.

(Following out of the hearing of the jury:

Mr. Eagleton: I want the record to show that the experience table shows that a man thirty-six years of age has a life expectancy of 31.07 years.)

Q. There is a column on this exhibit, the fourth—The first column states the age of the individual, does it not, at the left there?

A. That's right.

Q. And opposite the age 36 appears the expectancy in years, is that right?

A. That's right.

73 Q. And opposite 36 years will be found, so the jury can find it, the number of years' expectancy for a man of those years, is that right?

A. That's right.

Mr. Eagleton: That's all.

The Court: Cross-examine!

Cross-Examination by Mr. Horton.

Q. Have you had any actuarial experience, Mr. Williamson?

A. No, sir.

Q. You are an insurance salesman, aren't you, primarily?

A. Sales manager and salesman, yes.

Q. You had nothing to do yourself with the preparation of the American Experience Tables of Mortality, did you?

A. No, sir.

Q. What do they purport to show?

A. They purport to show an average expectancy of a cross section of one hundred thousand people starting at age 10, and carrying them on through until there are no survivors.

Q. One hundred thousand people of all walks of life?

A. Yes, sir.

Q. Do they purport to show the expectancy of a man engaged in a particularly hazardous occupation, such as a switchman in a railroad yards?

A. Well, if he were considered an average individual he would be in that group.

Q. Is a switchman for a railroad engaged in switching in the yards considered an ordinary individual?

A. Well, I imagine it would depend somewhat on the switchman.

74 Q. Isn't it a fact, Mr. Williamson, that in the sale of insurance and annuities to switchmen a higher rate is charged?

A. Slightly.

Q. How much for a man aged 34?

A. I am not prepared to answer that. I don't have the figure with me.

Q. Do you know what the rates of standard life insurance are?

You do, I presume?

A. Yes. I have those.

Q. And in your rates do you have separate classification rates for men engaged in hazardous employments?

A. Yes.

Q. And railroad switchmen are classed as being in hazardous employment, are they not?

A. They charge a slight extra premium.

Q. Will you answer my question?

The Court: Read the question.

(Question read by reporter.)

A. Well, there are varying degrees of hazard. Based on the extra premium that is charged, they would be in a group called "slightly hazardous" as compared to other groups that would be classed as extremely hazardous.

Q. Do you have any classification for yard switchmen in your rate schedule?

A. I am quite sure we do.

Q. And are not yard switchmen considered extra hazardous employments?

A. I can't answer that without information I don't have here.

Q. Well, when you are establishing the rate for a person engaged in a hazardous employment, they have to pay a

75 higher rate for their insurance, do they not?

A. Yes.

Q. And isn't the reason for that that their life expectancy is shorter than normal?

A. An accidental occupational hazard there.

Q. And don't you charge people in hazardous occupations a higher premium because their life expectancy is shorter?

A. That's right.

Q. Do you know how much shorter than normal the expectancy of a man engaged in yard switching is—

A. No.

Q. —aged 34?

A. No.

Q. But you do know that it is shorter, do you?

A. I am quite sure that there is a slight extra premium charge. We have nothing to do with calculating the rates which would indicate a slightly shorter expectation.

Q. But the table called the "American Experience Table of Mortality" which has just been introduced in evidence does not purport to cover the special classification of yard switchmen, does it?

A. It's a cross section, as I mentioned before, an average of—

Q. Answer my question now. You have in your rate schedule a special classification of rates for men engaged in hazardous occupations, do you not?

A. Yes.

Q. And they are charged a higher rate than the normal individual, are they not?

A. That's right.

Q. And the basis for that is because they have a 76 shorter life expectancy, isn't that so?

A. That's right.

Q. Now, the figures given in the American Experience Table of Mortality do not purport to cover the expectancy of a man engaged in a hazardous occupation, do they?

A. They are not designed especially for that purpose.

Mr. Horton: I see.

At this time I move that this exhibit be stricken as being incompetent and irrelevant, not tending to prove any of the issues in this case. It appears that it does not cover a case of a man engaged in a hazardous occupation, such as Mr. Tennant, who was a yard switchman.

The Court: I think the objection will be overruled at this time. Of course, it will be necessary for the plaintiff to connect it up.

The objection is overruled.

Mr. Horton: That's all.

Redirect Examination by Mr. Eagleton.

Q. Mr. Williamson, I asked you about 36. The age is 34, but, irrespective of 34 or 36, the age is shown at one column and opposite that is the expectancy under the title "Expectancy in Years"? That's true, whether it's 34 or 36, is it not?

A. That's right.

Q. Have you some manual or book which you can get here in the next little while which will show to what extent a man engaged in yard switching service is rated up? In other words, a man 34 in one service may be rated to an older age. That is how you figure his expectancy and how the premium is charged?

A. It is done that one way, by giving the rate corresponding to an older age, and the other way is by adding a flat extra charge, and I am not prepared to say which is true in this case, but I can obtain that information.

Q. Can you get that information?

A. Yes.

Q. Without too much inconvenience can you do it and come back in an hour?

A. I could get it over the telephone.

Q. You can?

A. Yes.

Q. Well, suppose you try that, then. Find how many years he is rated over 34 on account of the hazardous occupation. From whom do you get that?

A. From my office.

Q. That is something that is carried in a manual, or something of that kind?

A. Yes.

Mr. Eagleton: Will you insist upon getting the manual, Mr. Horton?

Mr. Horton: You are proving your case.

Q. I would suggest, Mr. Williamson, rather than go to the phone you had better, if you can, get the data and come back.

A. I will be glad to.

The Court: Call the next witness.

78 MARY TENNANT, the plaintiff, recalled, and having been previously sworn, resumed the stand and testified further as follows, in answer to

Direct Examination by Mr. Eagleton.

Q. Mrs. Tennant, I forgot to ask you yesterday: You were appointed by the Probate Court of Tazewell County as Administratrix in the case, were you not?

A. Yes, sir.

Mr. Horton: I object to that—

The Court: Objection sustained.

Mr. Horton: —as not being the best evidence.

The Court: Do you still insist on your objection? I believe the court is in error. The question may be answered.

Q. You were appointed as Administratrix of your husband's estate by the Probate Court of Tazewell County on July 17, 1941?

A. Yes, sir.

Q. And you have been continuing to act as Administratrix since that time?

A. Yes, sir.

Q. And you brought this suit as Administratrix?

A. Yes, sir.

Q. On behalf of yourself and minor child, is that right?

A. Yes, sir.

Q. Mrs. Tennant, I hand you certified copy of your appointment, of Letters of Administration, signed by the Clerk under his seal, the Clerk of the Probate Court, Mr. T.
79 E. Soltermann, appointing you Administratrix of the estate of your husband, Harold C. Tennant, under date of July 17, 1941. Were those Letters and that certificate issued to you?

A. Yes, sir.

Mr. Eagleton: I offer that in evidence, if the court please. (Note: PLAINTIFF'S EXHIBIT C.)

The Court: It may be considered as offered.

Anything else?

Mr. Eagleton: That's all, Mrs. Tennant.

The Court: Cross-examine!

Mr. Horton: No cross-examination.

The Court: Any objection?

Mr. Horton: No objection.

The Court: It may be admitted.

80 SHELDON MORRIS HARKLESS, called on behalf of the plaintiff, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Eagleton.

Q. Will you please state your full name to the court and jury?
A. Sheldon Morris Harkless.
Q. How old are you, Mr. Harkless?
A. Forty-four years old.
Q. Are you a married man?
A. Yes, sir.
Q. A man of family?
A. Yes, sir.
Q. And where do you live?
A. 401 South Park Avenue, Peoria, Illinois.
Q. On July 12, 1940, were you in the employ of the defendant, the Pekin Union Railway Company, here in Peoria and East Peoria, Illinois?
A. Yes, sir.
Q. How long had you been in the employ of that company?
A. About eighteen years.
Q. On the night of July 11, 1940, and up until the time of the death of Mr. Harold C. Tennant, was Mr. Tennant working as a member of your crew?
Q. Yes, sir.
Q. What was your capacity at that time?
A. The engine foreman.
Q. How many men in that switching crew on that evening and early morning of July 12, 1940?
81 A. Five.
Q. That was composed of yourself as foreman, an engineer, a fireman and two switchmen, is that right?
A. Yes, sir.
Q. Who was the engineer?
A. Thomas England.
Q. And who was the fireman?
A. R. E. Cole.
Q. Who were the brakemen or switchmen?
A. Harold C. Tennant and C. F. Bonner.
Q. B-o-n-n-e-r?

A. Yes, sir.

Q. Will you tell the jury and the court the general nature of the work that you did, that crew, without too much detail, after you went to work on July 11, 1940, around 11 P. M.? What work did you do there in connection with your switching done to the time you got on B-28 just before the accident?

A. Well, we had taken some cars from the A yard and put them on B-38, and, if I recollect, we switched a little train of perishable stuff and made a delivery to the T. P. & W.

Q. After that, what did you do?

A. When we came back from the T. P. & W. we shoved through number 40, track number 40. No, we didn't! We got a caboose off of B-12 and put it into number 10 pocket in the north end of the B yard, and went up through number 10 and switched a cut of cars that had came from the T. P. & W., ten or fourteen cars, something like that, I don't just recollect. Then we got five Nickel Plate box cars from B-17 and put them on B-30, went around down through 31 to the north end of the B yard again,
82 got these cars, and pulled them down on what they call the 30 lead, left them there, and then we went up through the middle lead with the engine, and we switched—throwed some cars, one into 21 and one onto 23, and put the rest of them back into 18 or 19, one of those tracks, and then we went against track number 28 with the engine.

Q. That's the point where I want to get down to. Prior to the time you got down to this track 28 that you came against, as you say, with the engine, you had made a T. P. & W. delivery, had you?

A. Yes, sir.

Q. Do you recall at approximately what time it was you had made your T. P. & W. delivery?

A. Well, we had to get the cars to the T. P. & W. before midnight.

Q. Was that a customary function of delivering with that crew, the T. P. & W. delivery, every night about that time? About midnight?

A. Yes, sir.

Q. Tennant, I believe, had been a member of this particular crew of which you were foreman from the 8th of July on, that is, the 8th, 9th, 10th, 11th and 12th, is that right?

A. Yes, sir.

Q. And this delivery to the T. P. & W. that you speak of was a nightly affair, was it?

A. Yes, sir.

Q. Now, when you came against track B-28 shortly before Tennant was injured or killed, how many cars were there on track B-28? Total?

A. Twenty cars.

83 Q. Twenty cars? And when you came into track B-28 you came in from what direction?

A. From the north.

Q. And you were headed in what direction?

A. We were headed to the south.

Q. What sort of an engine did you have?

A. A Diesel engine.

Q. And that is an electric as distinguished from a steam engine, is that right?

A. Well, yes.

Q. It's electric, isn't it?

A. Yes.

Q. When you came against B-28 coming from the north and going south on B-28, was your engine light?

A. Yes.

Q. There were no cars attached to it?

A. No, sir.

Q. And that is what you mean by a "light engine", is it?

A. Yes, sir.

Q. The twenty cars that were then on track B-28 were all south of the engine, is that right?

A. Yes, sir.

Q. So that the engine, in coming against it, was headed into the cars, all of which were immediately south of it, is that right?

A. Yes, sir.

Q. Were all of these cars on B-28 at the time you first came on that track coupled together, or were they in several groups?

A. They were in several groups.

Q. Do you remember how many groups there were
84 to make up the twenty cars? How many different groups there were? How many knuckles or joints you had to make to get them in a unit?

A. I will say three or four.

Q. The track at that place where you came against the first group of cars was running north and south, was it?

A. Yes, sir.

Q. The first group of cars you had come to with an engine coming from the north going south, the first group you would come to would be the northernmost group of cars on B-28, is that right?

A. Yes.

Q. At the time you came into that track for the purpose of coupling up the track, where was Harold Tennant with reference to that Diesel engine?

A. On the footboard of the engine, right front footboard of the engine.

Q. Right front footboard of the engine?

A. Yes, sir.

Q. Would that be the engineer's side or the fireman's side?

A. It would be the engineer's side.

Q. Is there a separate footboard on each side?

A. Yes, sir.

Q. Mr. Harkless, I'll hand you here a picture of a Diesel engine which has been marked by the reporter as Exhibit D, Plaintiff's Exhibit D, and ask you if that picture shows a Diesel engine of the kind that you were working with that night.

Mr. Horton: I object to the use of pictures in connection with questioning the witness, until and unless the pictures have been introduced in evidence in the proper manner.

85 The Court: I think he may answer that question.

Mr. Horton: There is no showing at all by any photographer that these pictures were ever taken.

The Court: That's true.

Mr. Horton: Or that they show a true representation of this engine.

The Court: I think he may answer the question of whether or not they show.

(Question read by reporter.)

The Court: The objection is overruled. He may answer.

A. Yes, sir.

Q. Does that correctly show a Diesel engine of the type such as engine number 200?

A. Yes, sir.

Mr. Horton: I object to testimony of this character,

and ask that it be stricken until it be shown it is Diesel engine number 200.

The Court: I think the objection will be overruled at this time, and it may stand.

Q. Now, Mr. Harkless, after the engine came in light from the north headed south, and moved southwardly against this group of cars, all of which were south of it on track B-28, and Harold C. Tennant was riding the front footboard of the engine, what work did you thereafter proceed to do with reference to coupling up those cars on track B-28?

A. Well, I went down the track and marked the empties and the loads, and Bonner, he let the brakes off of the cars and coupled the track up.

Q. In order to couple the track up so you would get
86 your several groups of cars, whether there be four or five groups, and get them altogether in one unit so they are coupled, what was it necessary for your engine to do in the way of movements to get those cars together?

A. Well, back up and go ahead, move northward and southward.

Q. Let me ask you with reference to that matter: What moves the engine, or how does the engine—or when does it move?

A. Well, the engine moves on signals.

Q. Who gives the signals?

A. Well, whoever happens to be doing the coupling.

Q. Who was doing the coupling on this occasion?

A. C. F. Bonner.

Q. He was one of the switchmen?

A. He was one of the crew.

Q. This was night time, was it?

A. Yes, sir.

Q. Was it dark?

A. Yes, sir.

Q. Was there any other way of giving a signal except by use of a lighted lantern?

A. No, sir.

Q. Is that the manner in which the signals were given?

A. Yes, sir.

Q. Now, starting at the north end with your engine light, you coupled onto the first group of cars in the north end. How many were in that group as you recollect?

A. I believe two.

Q. Was Harold Tennant alive at the time that first group were coupled, and was he on the footboard of the engine at that time?

87 A. Yes, sir.

Q. After coupling that first group of two, how did those two get down to where the next group was south of them?

A. They had to be shoved down there with the engine.

Q. Who gave the signal to shove them down to the next group?

A. Bonner.

Q. How far was the second group? How much space intervened between the first group and the second group starting at the north end? Approximately?

A. Well, three or four feet, something like that.

Q. Three or four feet?

A. Yes.

Q. How many cars were in the second group?

A. Well, there was three or four in the second group, three or four cars.

Q. How much space between the second group from the north and third group?

A. Well, three or four car lengths.

Q. How long is a car length, approximately?

A. Well, forty feet.

Q. And how much space between the third group from the north and the next group south, the fourth group?

A. Well, I think the knuckle was butted on those cars.

Q. How much space intervened, whether they were butted or not?

A. They were right up against one another.

Q. Someone had to open a knuckle?

A. Yes.

Q. So, instead of being butted against, they could interlock and couple?

88 A. Yes, sir.

Q. Was that done?

A. Yes, sir.

Q. By Bonner?

A. Yes, sir.

Q After you got all of those cars coupled together—You did get them all coupled together, didn't you?

A. Yes.

Q. Where were you when they were finally coupled together with reference to the engine?

A. Twenty car lengths away.

Q. That would be down near the rear of the train?

A. Yes.

Q. If the average length of a car is forty feet, you would be some eight hundred feet from the engine?

A. Yes.

Q. Where was Bonner with reference to you?

A. He was there with me.

Q. And were all of you, Bonner, yourself and Tennant, all on the engineer's side?

A. Yes, sir.

Q. That would be the west side?

A. Yes, sir.

Q. Tennant's job was what in connection with the movement of the train, and his position and location? What did you call him?

A. Well, they called him "pin puller" or "head man" or "head brakeman" or "head switchman".

Q. The word "head breakman" or "head switchman" or "head man", that doesn't mean the same as we
89 mean with reference to head waiter, that he is over somebody. It simply means he follows the head end?

A. Yes, sir.

Q. And the head end is your engine end?

A. Yes, sir.

Q. In this particular instance, he was the man that would stay closest to the engine?

A. Yes, sir.

Q. From the time you came into B-28 after passing the switch point which let you in there, was your track straight?

A. Yes, sir.

Q. Down to the point where all the cars were coupled together, it was straight north and south?

A. Yes, sir.

Q. How many times in that process of getting your cars coupled together before you moved northwardly—how many times did you have to stop your engine and come to a complete stop and start up again in order to couple up this unit?

A. Well, six or eight times.

Q. And each one of those six or eight times when your engine came to a stop and started up again, it was in order to perform some part of the task, is that right?

A. Yes, sir.

Q. After you got them all coupled together and you were down at the rear end of the train twenty car lengths away from the engine, what, if any, signal did you give for the engine to move out to the north with this group of cars?

A. I gave the engineer a back-up signal.

Q. That meant for it to go which direction?

90 A. North.

Q. And the engine would then back up with the twenty cars that were south of it attached to it, and continue on north, is that right?

A. Yes.

Q. Where were you intending to take the cars?

A. To the repair track.

Q. What track is that?

A. Well, that's—I guess they call it the "G yard". It's where they repair cars.

Q. When you get up to 28, you go in on some other track?

A. Yes, sir.

Q. At the time you gave that back-up signal to move that engine to the north after your train had been coupled together, was Harold Tennant or his light in view?

A. No, sir.

Q. Did the engine, after you gave the back-up signal, did it start backing up?

A. Yes, sir.

Q. How far did it go backing up after you gave that signal when your train was coupled together before it came to a stop? Approximately how many car lengths or distance, any way you want to express it?

A. About fifty car lengths.

Q. Did you give a signal for it to stop?

A. No, sir.

Q. Where did you go after you had given this signal?

A. I cut across the yard to line up switches.

Q. Before cutting across the yard to line up some switches, had you ridden any car out of B-28?

91 A. Yes, sir.

Q. What car did you ride out with reference to the rear end? How many cars from the rear end?

A. Fourth car from the rear end.

Q. That would be the sixteenth car from the engine, or the fourth car from the rear end if there were twenty?

A. Yes, sir.

Q. Where did Bonner ride?

A. Bonner rode on the car next to me.

Q. South of you?

A. South of me.

Q. That would be the third car from the rear end?

A. Yes, sir.

Q. Do you happen to remember from any recollection what those cars were? Numbers?

A. Well, the one that I was on was a Nickel Plate box car, and the number was 9160.

Q. And the other car that Bonner was on was what?

A. ERDX refrigerator.

Q. Do you remember its number from a statement that was made at the time?

A. Twenty-one—two thousand class of cars.

Q. It was in the two thousand class?

A. Twenty-one hundred and something.

Q. Now, how far, after you got on the fourth car from the south end and Bonner got on the third car from the south end and your engine was starting to back out with these twenty cars off of B-28 backing to the north, how far did you ride before you got off?

92 A. About halfway of the track.

Q. About how many car lengths?

A. About fifteen cars.

Q. How far did Bonner ride?

A. We both got off together.

Q. When the cars that were between you and the rear end, fourth, third, second from the rear end, cleared you went across the track?

A. I went toward the west, or north.

Q. You didn't have to cross the same track you were on, B-28?

A. No, sir.

Q. You went west?

A. Yes.

Q. When this engine went on out backing up and came to a stop without any signal from you, what did you do?

A. Well, Bonner and I was standing there at the switches, and he didn't come back and I walked on up.

I said, "Well, I guess I'm going to have to go up and see what is the matter." I went up to the cut of cars lining the switches, and at that time there was another cut of cars came through the yard and we had them blocked. He was going to the T. P. & W. I shoved the cars back toward the repair track, and Bonner stayed there at the switch, cut my engine off and shoved these cars on the 30 lead toward—to clear track number 37, and this C. B. & Q. engine came through 37, so we backed up over the switch to get out of the road of this man, this "Q" engine, and I asked England, "Where's Tennant?"

Q. That is the engineer?

A. Yes, sir.

93 Q. And then—

A. And he said, "I don't know", so I just reached down and throwed the switch back over, and we went up the middle lead. I said, "We will go look for him."

Q. When you went looking for him, did you have cars coupled to the engine or went light?

A. Went light.

Q. You took the cars off of your engine?

A. Yes.

Q. This engine had gone north in response to your signal and west a considerable distance? About fifty car lengths?

A. About fifty car lengths.

Q. When you came back, you came back the first direction from which you had come?

A. Yes.

Q. You came back to the east, and then to the south again?

A. Yes.

Q. On the same track you had gone out on?

A. Yes.

Q. When you came back, how far did your engine go on its return trip before you discovered any part of his body?

A. About fifteen car lengths.

Q. Where did you discover his body?

A. At the 28 divide switch.

Q. And where was the body with reference to either the switch or the west rail of track B-28?

A. Well, it was on the outside of the west rail of B-28, right at the switch.

Q. Right at the switch?

94 A. Yes.

Q. What part of his body was there?

A. Well, there was two parts of his body there.

Q. Tell what parts they were there.

A. His left hand, and left arm and hand and his torso.

Q. Torso, including what part of his body?

A. His head and right hand was missing.

Q. His head was missing, and his right hand was missing?

A. Yes.

Q. The rest of his body, outside of his head and right hand, was at that point, was it?

A. Yes.

Q. But in two parts?

A. Yes, sir.

Q. You discovered that body after you came back from the direction in which you had gone on signal and came back from the west to the east, and came back around to the south and stopped your engine when you saw his body?

A. Yes.

Q. How far north of his body did you stop your engine before you came to it and discovered it?

A. Oh, about seven or eight feet.

Q. And from that time on, when the light of your engine revealed his body immediately outside the west rail of B-28, did you move your engine any further south after that time?

A. No, sir.

Q. At any time?

A. No, sir.

Q. Now, did you then, at that point where you

95 found this torso, look down to discover the other parts of his body?

A. Yes, sir.

Q. What did you see to the south of there?

A. Lantern.

Q. A lantern?

A. Burning.

Q. Did you walk down there?

A. Yes, sir.

Q. Who went with you?

A. Myself.

Q. Did the engine go down there?

A. No, sir.

Q. It never did go south of where that body was found? That torso?

A. No, sir.

Q. Did you walk down this distance of seven car lengths, whatever it was, to wherever the light was burning?

A. Yes.

Q. Was it about seven car lengths?

A. About seven or eight car lengths.

Q. What did you find there where the lantern was burning?

A. I found the right hand and his lantern, his cap and a big pool of blood.

Q. That was the cap and the lantern and the right hand of Harold C. Tennant?

A. Yes.

Q. And this pool of blood was where, with reference to where the cap, lantern and hand were?

A. It was about six feet away from them.

Q. Where, with reference to the rail? The west rail?

96 A. Well, right close to the west rail.

Q. Now, from the time you had gone north from that point where you saw that blood, the cap, the lantern and the hand, had you ever come back south again to that point with your engine?

A. No, sir.

Q. At the place where this cap, lantern and hand and pool of blood were, where was that with reference to the point where the last coupling had been made?

A. That would be about where the engine was stopped with the last coupling.

Q. In other words, the place where the blood was, the hand, cap and lantern, was where the engine stopped in coupling up the track when it moved to the south at the furthest point at the south, is that right?

A. Yes, sir.

Q. It had never been south of that?

A. No, sir.

Q. And all movements of the engine after that time were to the north and northwest?

A. Yes.

Q. When you came back you stopped your engine, and never did get closer than seven car lengths to the hand, cap and lantern?

A. No, sir.

Q. From the time your engine was light and coupled onto the first group of cars at the north on track B-28, and continued on south to couple the various segments of that train together at three or four different joints, and after it backed to the north upon your signal, at any of those times when the engine started up from a standing position state whether or not the engine sounded
97 or rang a bell.

Mr. Horton: I object to that.

A. No, sir.

The Court: He may answer.

Mr. Horton: I object on the ground there is no sufficient foundation that from where this man was located he could have heard the bell.

The Court: The objection is overruled. It's a question for the jury.

Mr. Harkless, I'll hand you here an exhibit which has been marked "Plaintiff's Exhibit A", a book of transportation rules of the Peoria and Pekin Union Railway Company, and refer you to page 33, rule 30. I'll ask you to read that rule, please.

Mr. Horton: I object unless the book is properly identified.

The Court: Objection sustained.

Mr. Eagleton: I thought I had. I will offer the book in evidence.

The Court: I don't understand it has been.

Mr. Eagleton: I offer the book in evidence.

Mr. Horton: I would have no objection to the admission of the book in evidence if it were offered for all purposes, for all the rules that may be pertinent to the issues in this case.

The Court: Any reason why it can't be so offered?

Mr. Eagleton: I don't know all the rules in there. The book has been admitted under the admission of facts, that this is a book of the defendant promulgated for that purpose.

98 The Court: It has been so admitted?

Mr. Horton: Are you admitting the whole book?

Mr. Eagleton: No, I am not offering the whole book.

Mr. Horton: I object to the offer of the book.

The Court: I thought in the beginning he was offering the book, but now he states he is not.

Mr. Eagleton: I am offering rule 30.

The Court: That has been admitted under your pleadings covering this particular transaction?

Mr. Eagleton: Yes, sir.

Mr. Horton: No, it has never been admitted as a competent or proper rule in this case, or having anything to do with the rules in this case.

The Court: Are these the rules that govern in this particular place?

Mr. Horton: This is a book of rules and, if he wants to put the book in for all purposes, I will have no objection.

Mr. Eagleton: I am offering rule 30 as found on page 33 of this book of rules, transportation rules, 1929, promulgated by the defendant.

The Court: What is your admission under your pleadings?

Mr. Eagleton: The admission called for and the admission are as follows:

"Plaintiff's Requests for Admission of Facts."

(This is merely the first paragraph.)

"Comes now the plaintiff and requests the defendant to admit the truth of the following relevant matters necessary to establish the allegations in plaintiff's 99 complaint."

19—18, rather: "That prior to the said 12th day of July, 1940, the defendant did promulgate certain transportation rules governing the movement of trains, engines and cars, and the employees employed by the defendant in connection therewith upon its properties, and did publish said rules in a small book entitled 'Transportation Rules', 'Dated January 1, 1929'."

The admission on that—

Mr. Horton: It asks whether there had been such a book.

Mr. Eagleton: It asked what it said.

The Court: What is the admission?

Mr. Eagleton: The admission is, with reference to paragraph 18: "Defendant admits the statement set forth in paragraph 18 of said request."

Mr. Horton: That is the entire book.

The Court: I think I will let either offer whatever part of the book you desire to offer.

The objection will be overruled.

I want to make sure the reporter has that.

Q. What is that rule 30, Mr. Harkless?

A. "The engine bell must—"

Mr. Horton: I object to the witness reading.

The Court: Objection sustained. It shows for itself. It is admitted.

Mr. Eagleton: I will offer and read in evidence rule 30.

The Court: You may so read.

Mr. Eagleton: "The engine bell must be rung when an engine is about to move and while approaching and
100 passing public crossings at grade, and to prevent accident."

Mr. Horton: I want to object to the reading of that rule to the jury, and ask that it be stricken, for the reason that that rule, standing by itself and not considered in connection with other rules, is incompetent, immaterial and not tending to prove any of the issues in this case.

The Court: The objection is overruled. I think it may stand. Either of you may read any particular part that is pertinent to the issue.

Read the question.

Q. Mr. Harkless, that rule that I have just read, rule number 30, with reference to this ringing of the bell, was that rule in force and effect on July 12, 1940?

A. Yes, sir.

Mr. Horton: I object to that.

The Court: Objection sustained. Doesn't the book show that it is?

Mr. Eagleton: Yes, I think it does, Your Honor.

The Court: I think, if that is true, the objection will be sustained.

Q. Was any such bell rung on any of those times after you saw Tennant on the front end of that footboard, until you found his body later, while making any of those movements and starting up the engine from a stationary position?

Mr. Horton: I object because it asks the witness for a conclusion.

The Court: The objection is overruled.

A. No, sir.

101 Mr. Horton: I further object and ask it be stricken on the ground there is no showing this man had good hearing, or that he was in a position to hear the bell had it been rung.

The Court: Objection overruled.

Q. Is your hearing good?

A. Fair.

Q. Is your hearing—Was your hearing on July 12 just as good as it is today?

A. Yes, sir.

Mr. Horton: I further renew my objection, and ask that that evidence be stricken on the ground it appears now the witness's hearing was not good from his own admission.

The Court: The objection is overruled. It is a question for the jury.

Q. Mr. Harkless, I will ask you if there was a practice and custom existing in that yard at that place and time, and for a long time prior thereto, with reference to an engine being started at a time when a member of the crew was missing? Was there such a practice and custom?

Mr. Horton: Objected to as calling for a conclusion.

The Court: Read the question.

(Question read by reporter.)

The Court: The objection is overruled. He may answer.

A. Yes, sir.

Q. What was that practice and custom at that time, and for a long time prior thereto?

Mr. Horton: I object to that.

102 A. Ringing the bell on moving engine.

Mr. Horton: He can't testify to any practice or custom.

The Court: The objection is overruled. He may answer.

(Question read by reporter.)

The Court: You may answer.

A. Ringing the bell before starting an engine.

Q. I am speaking particularly with reference to a time when a member of the crew was missing. What was the practice in that matter?

A. When they are missing, to stand still.

Q. Stand still?

A. Yes, sir.

Q. You mean don't move a car or engine when there is a member of the crew missing?

A. Yes, sir.

Q. And that was the practice and custom at that time?

A. Yes, sir.

Mr. Horton: I object, and move it be stricken. No sufficient foundation has been laid.

The Court: What do you mean by that?

A. By the fireman or the engineer.

The Court: I think it may stand. The objection will be overruled.

Q. With reference to these rules, Mr. Harkless,—

Mr. Eagleton: I want to read also in evidence rule 106.

Mr. Horton: Wait a minute!

The Court: Show it to counsel. I don't know what it is.

Mr. Horton: You offered one rule.

Mr. Eagleton: I want to offer another one.

103 The Court: Any objection?

Mr. Horton: I object as incompetent.

The Court: Let's see rule 106. (Examines same.) What is your objection?

Mr. Horton: I withdraw my objection. I have none to this rule.

The Court: It may be admitted.

Mr. Eagleton: Rule 106 is as follows: (I offer this in evidence.)

"Both the conductor and the enginemen are responsible for the safety of the train and the observance of the rules, and, under conditions not provided for by the rules, must take every precaution for protection.". I also offer in evidence from this same exhibit and book of rules the following paragraph, first paragraph on the opening page of the book.

The Court: Any objection?

Mr. Horton: Well, he offered this book for one rule. Now he seems to be skipping over all the book and reading what he wants to.

Is he offering this book for all purposes?

The Court: I understand not. I am granting the same right to you.

What is this?

Mr. Eagleton: To show when they went into effect.

The Court: Any objection?

Mr. Horton: No objection.

The Court: It may be admitted.

Mr. Eagleton: That paragraph reads as follows:

104 "Peoria and Pekin Union Railway Company

"Transportation Rules

"Revised January 1, 1929

"The rules herein set forth govern the railroads operated by the Peoria and Pekin Union Railway Company.

They take effect January 1, 1929, superseding all previous rules and instructions inconsistent therewith.

"Special instructions may be issued by proper authority.

"These rules are in accordance, as far as practicable, with the Standard Code of the American Railway Association.

V. V. Boatner,
President."

And the next page to that, under the title "General Notice".

Mr. Horton: You want to offer something else in the book?

Mr. Eagleton: I don't wish to be condemned because I can only try my case in my own feeble way.

The Court: It may be admitted.

Mr. Eagleton: "General Notice

"Safety is of the first importance in the discharge of duty.

"Obedience to the rules is essential to safety.

"To enter or remain in the service is an assurance of willingness to obey the rules."

Q. Now, Mr. Harkless, after you had found the lantern, right hand, cap and this blood, and previous thereto you had found the torso, did you then go on farther back in an effort to find the head of the man?

105 A. Which way back?

Q. I mean back to the northwest.

A. Yes.

Mr. Horton: I object to evidence of this kind.

The Court: Objection sustained. It's leading.

Q. What did you do with reference to finding the remainder of the body, if anything?

Mr. Horton: I object to that on the ground and because it is incompetent and unnecessary. He's merely trying to make this case appear gruesome for the benefit of the jury. It's prejudicial.

The Court: The objection is overruled. I think he may answer.

Mr. Eagleton: May I ask that counsel make his objection to the court? I deny I am trying to make it gruesome. I understand I have to show substantially what happened.

The Court: The objection is overruled.

(Question read by reporter.)

The Court: You may answer.

A. Well, we went back north. The yardmaster was there at that time. We went back north with the engine from where it was standing approximately about fourteen car lengths, and found the man's head lying in a frog of the track.

Q. That fourteen car lengths would be north and west of the place where the torso was found?

A. Yes, sir.

Q. Whereas, the hand, cap and lantern would be seven or eight car lengths south of where the torso was found, is that right?

A. According to the direction it would be kind of
106 north and west, or east. The tracks kind of run different directions there.

Q. I don't want to get you confused or be confused myself. Taking the point where the torso was found at the switch point, B-28, that is where you found the torso?

A. Yes.

Q. The head was found about fourteen car lengths north and west of that point?

A. Yes, sir.

Q. But the cap, hand and lantern were found seven or eight car lengths south of that point?

A. Yes, sir.

Q. I will hand you Plaintiff's Exhibit E, and ask you if that exhibit shows track 28, correctly shows track 28 near the place where this cap and hand and lantern were.

Mr. Horton: I object to that. The attorney is referring to it as an exhibit number without showing it is only for the purposes of identification, referring to it as an exhibit. It isn't in evidence, and I object to it.

The Court: It isn't in evidence and may not get into evidence, but I think he may answer the question if he knows that question.

What does it correctly show?

A. North end of track 28.

The Court: All right.

Q. And how far does it show, if you can tell, the point south of the switch point that you referred to where the torso was found? How much of the track?

A. The picture shows about eight or nine cars.
107 Q. Eight or nine car lengths?

A. Yes.

Q. Now, that picture was taken, incidentally,—taken

from the south looking north toward the switch point; is that right?

A. Yes, sir.

Q. Plaintiff's Exhibit F, does that show the particular switch point and switch stand in the picture in the foreground near which the torso was found?

A. Yes, sir.

Q. That is taken from the south looking north, also, isn't it?

A. Yes, sir.

Q. Does Plaintiff's Exhibit G show the frog that you speak of about fourteen car lengths north and west of where the torso was found? Show the frog where the head was found?

A. Yes, sir.

Q. Will you point out, for the benefit of the jury, by turning this picture around?

Mr. Horton: I object.

The Court: Objection sustained.

Mr. Eagleton: I will offer in evidence PLAINTIFF'S EXHIBITS D, E, F and G.

Mr. Horton: I object; no sufficient foundation.

The Court: Objection sustained. You will have to show how the pictures were taken and who took them, and with what kind of an instrument they were taken. The objection will be sustained.

Q. Mr. Harkless, are you working for the company at the present time?

A. No, sir.

108 Q. How long has it been since you worked for the company?

A. Since November 25, 1940.

Q. And was that on account of some injury at that time that occurred to you?

A. Yes, sir.

Mr. Eagleton: I believe that's all.

The Court: I believe we will take a recess at this time. The jury may retire.

(Recess.)

Mr. Eagleton: Mr. Horton has permitted me, and I now recall Mr. Williamson, with the court's consent, to ask a question or two with reference to rates.

KENNEY E. WILLIAMSON, having been previously sworn, resumed the stand and testified further, in answer to

Direct Examination by Mr. Eagleton.

Q. Mr. Williamson, have you secured your manual from your office which shows the difference in the rating between a railroad switchman, age 34, yard switchman, and an average person in other walks of life?

A. Yes.

Q. And what is the difference in rating a railroad switchman and an ordinary person at 34 years of age insofar as insurance companies are concerned?

A. $5.00 per thousand.

109 Q. What is the rate per thousand for an ordinary person?

A. $25.58.

Q. And with the $5.00 added per thousand for the yard switchman, at what age does that $30.00 and whatever it is, 58¢, what age ordinary life is that consistent with under the experience table?

A. That would correspond to a rate between ages 39 and 40.

Q. And is the expectancy of one of the age 39 and also of the age 40 shown in that same experience table you had here this morning in the same column?

A. Yes.

Q. Is that right?

A. Yes.

Q. In other words, there is less expectancy at 39 and 40 than there is at 34, of course?

A. That's right.

Mr. Eagleton: That's all.

The Court: Cross-examine!

Cross-Examination by Mr. Horton.

Q. In other words, Mr. Williamson, a man engaged in a hazardous occupation, such as a yard switchman, must pay $5.00 a thousand more for his insurance at age 34 than an ordinary individual?

A. That's right.

Q. And that computation means, does it, that the switch

man aged 34 is charged the same rate for his life insurance that a man between 39 and 40, an ordinary man between 39 and 40, would be charged?

A. That's right.

110 Q. So that a switchman aged 34 has between five and six years less expectancy of life than an ordinary individual under those tables?

A. Well, that wouldn't be exactly true because, in the table, as the years advance the expectancy is greater, the theory being that the weaker ones drop out.

Q. Well, if the man in a hazardous occupation is considered by insurance companies as having to pay a higher rate, that is because he has a shorter expectancy of life, isn't it?

A. That's right.

Q. And if a switchman aged 34 must pay the same rate as a man 39 or 40, that means he has a shorter expectancy at age 34?

A. That's right.

Q. By five or six years, doesn't it?

A. Well, there is a technical difference there. May I just call it to your attention. At age 34 the expectancy is thirty-two and one-half years, according to the American Experience Table. At age 39 it's twenty-eight and nine-tenths years, age 40 it's twenty-eight and eighteen-hundredths years.

Q. I am not asking you what the normal individual age 39 or 40 has in the way of expectancy. I am asking you what the switchman aged 34 has in the way of expectancy, and isn't it true, from your answer you have given, that this switchman aged 34 has from five to six years less expectancy than an ordinary individual aged 34?

Mr. Eagleton: I object because it contains two questions in one, first, and, second, because he already answered.

The Court: The objection is overruled. He may answer.

111 A. Well, there is a slight technical difference which it's difficult to answer. This extra premium of $5.00 a thousand is charged because of the extra hazard. However, when you consider it from the standpoint of the rate that is paid, that puts the 34 year old man in the same age group as the 39 to 40, in which case the difference in expectancy is about four years instead of five or six.

Q. Yet, Mr. Williamson, the higher price for insurance

which the switchman aged 34 must pay is based upon a shorter expectancy of life than a normal individual at that age, isn't it?

A. That's right.

Q. And he must pay for his insurance at age 34 the same rate that a normal individual 39 to 40 will pay? Isn't that what you said?

A. That's right.

Mr. Horton: I think that's all.

Mr. Eagleton: That's all.

The Court: Call the witness for cross-examination.

Mr. Eagleton: I want to ask one or two questions before that.

112 SHELDON MORRIS HARKLESS, having been previously sworn, resumed the stand and testified further, in answer to

Direct Examination by Mr. Eagleton.

Q. What was the rate of pay for switchman per day at the time on July 12, 1940? What was the rate that was being paid here to Mr. Tennant at that time?

Mr. Horton: I object to that, as to what was being paid to Mr. Tennant at that time. There are certain figures that have been agreed upon in this case, and are among the admitted things in the case, as to what Tennant was paid at that time.

The Court: Do they show?

Mr. Eagleton: It doesn't show the basic rate of pay. It shows what he did, in fact, earn in three years.

The Court: Did they pay the same to each switchman?

Mr. Eagleton: Yes, Your Honor.

The Court: I think he may answer that.

Q. All switchmen are paid the same?

A. Switchmen and helpers are paid $7.06 for eight hours' pay.

Q. They are all paid the same rate of pay?

A. And the foreman $7.58.

Q. And that is what the prevailing rate was on July 12, 1940?

A. Yes.

Q. Since that time there has been an increase?

A. Yes, sir.

Q. To what extent?

A. About 10% or 12%.

113 Mr. Horton: I object to the increase. It occurred since Tennant's death. I ask that it be stricken.

The Court: It may stand.

Q. Mr. Tennant, without taking more time on these pictures, I show you exhibits which were identified, or marked but not offered in evidence, as E, F and G, and I will ask you if those pictures correctly represent and reproduce the conditions that were shown there that night with reference to the location of track B-28 at the various points you have mentioned where the different parts of the body were found? E, F and G?

Mr. Horton: I object to that. It's an improper way to introduce a photograph.

The Court: They are not being introduced.

I think he may answer that.

A. They were about—

Q. Take a look at them, that is, E, F and G, each one of them, and see if they correctly reproduce the track and the things they show there as they existed on the night in question. Of course, they don't show the body or anything.

A. It shows the tracks, and the picture shows more cars on this 29 track than on that night.

Q. With reference to track B-28, does that show it correctly?

A. Yes.

Q. The two underneath— You are looking at one. Do they show it correctly, and reproduce it correctly?

A. Yes, sir.

Mr. Horton: I don't know what you are talking about.

The Court: Name the exhibit.

Mr. Horton: What exhibit are you talking about?

114 Q. The first one you said was correct was Plaintiff's Exhibit E. Now, I will show you Plaintiff's Exhibit F, and ask you if that correctly shows track B-28 as it existed on the night in question at the switch stand where the torso was found?

A. Yes, sir.

Mr. Horton: What switch stand?

Mr. Eagleton: B-28.

Q. And also the frog where his head was found? Is that correctly shown in Plaintiff's Exhibit G, and reproduced correctly?

A. Yes, sir.

Mr. Eagleton: I again offer those pictures in evidence, if the court please.

Mr. Horton: Same objection: No foundation.

The Court: Objection sustained.

Mr. Eagleton: I except to the ruling.

That's all, Mr Harkness.

Cross-Examination by Mr. Horton.

Q. Mr. Harkless, you had an accident, I believe you testified, yourself on or about November 25, 1940, is that true?

A. Yes, sir.

Q. At the time of receiving— At the time of having that accident were you an employee of the Peoria and Pekin Union Railway Company?

A. Yes, sir.

Q. Acting in what capacity?

A. Switchman helper.

Q. You were not a foreman—

A. No, sir.

115 Q. —at that time? What was the nature of your accident? How did you hurt yourself?

Mr. Eagleton: I object as being immaterial in this issue, if the court please.

The Court: What is the purpose? The credibility of the witness? Is that the only purpose?

Mr. Horton: It all hooks up. I am just trying to find out that he received injuries.

The Court: I think he has admitted that.

Objection sustained.

Mr. Horton: He said he had an accident. He didn't say anything about his injuries.

Q. Did you hurt your knee about that time?

A. Yes, sir.

Q. Did you hurt it in stepping off or on an engine footboard? Didn't you?

Mr. Eagleton: I object; wholly immaterial how it occurred to any issue in this case.

The Court: Is there some attempt to show some altercation with the defendant? Is that the purpose?

Mr. Horton: Yes.

The Court: I think he may answer.

Mr. Eagleton: I don't understand that is the question, whether there is any feeling. He is asking about the occurrence.

Mr. Horton: I will connect it up.
The Court: If you connect it up, all right. Otherwise, it will be stricken.
(Question read by reporter.)
116 A. Getting on the engine footboard.
Q. You haven't worked for the railroad since that time, have you?
A. No, sir.
Q. You made a claim against the company for damages, didn't you?
A. I haven't yet.
Q. Didn't you come to see me as the attorney for the railroad for the purpose of making a settlement?
A. Yes, sir.
Q. And you made certain demands, did you not, of what you wanted in settlement?
A. Not in writing.
Q. Did you make certain oral demands of what you wanted in the way of a settlement to me at that time?
A. Yes, sir.
Q. I will ask you if one of your demands was not that you be reinstated as a foreman.
A. Yes, sir.
Q. And I told you that it was impossible for me to grant that to you, did I not?
A. Yes, sir.
Q. Another demand that you made at that time was that you receive permanent employment, isn't that a fact?
A. Yes, sir.
Q. And I told you that I could not give that to you, isn't that a fact?
A. Yes, sir.
Q. Another demand that you made was for a certain sum of money, isn't that right?
A. Yes, sir.
117 Q. And that was refused you, wasn't it?
A. Yes, sir.
Q. And no settlement has ever been made with you—
A. No, sir.
Q. —for your injuries?
A. No, sir.
Q. And, following that, you went to see Mr. Eagleton, did you not?
A. Yes, sir.
Q. In connection with your injuries?

A. Yes, sir.
Q. Is Mr. Eagleton your lawyer?
A. No, sir.
Q. But you have talked to him about your case, have you?
A. Yes, sir.
Q. You have not yet commenced a suit yourself against the company?
A. No, sir.
Q. I will ask you if sometime following the Tennant accident, and sometime before you had your accident in the year 1940, if you did not have some kind of a fraças or misunderstanding with the night yardmaster, Cisna?
A. Yes, sir.
Q. What was the nature of that, Mr. Harkless?
A. Well, I called him on the phone from my home, and asked to be off that night, and he didn't answer the phone, and I called again and I finally got him on the telephone, and he wouldn't let me off, and I stayed off on my own accord.
Q. And at the same time didn't you have some conversation with his girl stenographer or secretary?
Mr. Eagleton: I object to all this as immaterial, 118 if the court please.
The Court: A question of interest to be considered by the jury. It may be admitted for that purpose only.
A. No, sir, not his secretary.
Q. Who was the girl employee that you talked to?
A. The telephone operator.
Q. Of the Peoria and Pekin Union Railway Company?
A. Yes, sir.
Q. Did you have some kind of an altercation with her over the phone?
A. Yes, sir.
Q. And I will ask you if it isn't true that you called her a foul and unprintable name over the phone?
A. Well, I don't just remember that right now.
Q. You were drinking at that time, weren't you?
A. No, sir.
Q. You say that now, as a matter of fact, you were not drinking when you had this altercation?
A. No, sir.
Q. The result of that was that you were called up on the carpet, wasn't it?
A. Yes, sir.

Q. And there was an investigation of the episode held?
A. Yes, sir.
Q. And a hearing?
A. Yes, sir.
Q. And the result of the hearing was that you were reduced from a foreman to a switchman, isn't that true?
A. Yes, sir.
Q. And you have been pretty sore about it ever since, haven't you?
119 A. Yes, sir.
Q. And you have never been reinstated since that time?
A. No, sir.
Q. Mr. Harkless, you solicit cases in this area for Mr. Eagleton, do you not?
Mr. Eagleton: I object as being untrue and unfounded. I never saw that man before he came to my office.
The Court: He has a right to ask the question.
A. No, sir, I am not a court solicitor.
Mr. Eagleton: I ask, in view of that statement, under the rules of ethics that are prescribed here, that Mr. Horton say he will connect that and prove it. I think it is unfair.
The Court: It isn't unfair to anyone because counsel's question is not evidence before the jury. It is the answer to the question, and the witness testified he was not, so nobody is hurt.
Q. Mr. Harkless, I will ask you if you did not talk to Mrs. Tennant, the plaintiff in this case, about her going to Mr. Eagleton as her lawyer. Did you or did you not talk to her?
A. I did.
Q. And did you thereafter go to St. Louis with Mrs. Tennant?
A. Yes, sir.
Q. That was prior to the institution of this suit, was it not?
A. No, sir.
Q. Well, do you know when this suit was started?
A. No, sir.
Q. When did you go to St. Louis with Mrs. Tennant?
A. Along last July.
120 Q. And why did you go to St. Louis with Mrs. Tennant?
A. On my own case.
Q. Why did you take her with you on your own case?

A. Well, see—I met her on the street, and she asked me about my leg, and I told her that I was going to St. Louis to a Trainmen's attorney to consult him, and she asked me if he would listen to her case, and I told her I couldn't do a thing for her, she would have to write there and get an appointment with Mr. Eagleton, and that is what she did.

Q. Then you decided to go down together, did you?

A. We decided to go down together.

Q. How did you go?

A. On the Traction.

Q. And after you got to St. Louis where did you and Mrs. Tennant go?

A. We went to the hotel.

Q. Stayed at the hotel?

A. Yes, sir.

Q. Then did you go to the office of Mr. Eagleton with her?

A. She went there herself, and I had a different appointment with him and I went there.

Q. Did you go to his office with Mrs. Tennant?

A. About— Yes.

Q. At the same time?

A. About the same time, yes.

Q. Do you have any agreement with Mr. Eagleton as to a cut or share of any judgment that might be entered in this case?

A. No, sir.

Q. Getting back to the night of July 12, 1940, you were the foreman of Tennant's crew, were you not?

121 A. Yes, sir.

Q. And that crew had a definite assignment, did it not, called the "East Peoria industry job"?

A. Yes, sir.

Q. You had been the foreman of the East Peoria industry job for sometime, hadn't you?

A. Yes, sir.

Q. About how long prior to July 12, 1940, had you had this job?

A. About ten months.

Q. Did you have Engineer England during that period of time?

A. No, sir.

Q. Was Engineer England your engineer for quite a

while during the time you had the East Peoria industry job?

A. Yes, sir.

Q. About how long prior to the time of this accident?

A. Oh, he was on there three or four months at different times. He was on there at different times.

Q. Had Tennant been a member of this crew for sometime prior to the accident of July 12, 1940?

A. He came on that crew on the Monday before his death.

Q. And that was in July, wasn't it?

A. Yes, sir.

Q. And then in the month of May, 1940, he was a member of that same crew working under you from May 14 to May 29, was he not?

A. Well, I haven't any record of it. I don't just remember, but he could have been a member of the crew.

Q. You remember that he has worked with you on previous occasions?

A. Yes, he worked with me on different occasions.

122 Q. On that same job?

A. Yes, sir.

Q. He was an experienced man, wasn't he?

A. Yes, sir.

Q. He had been with the railroad as a switchman for some years, hadn't he?

A. Well, he had been here about three years, I should judge.

Q. Now, one of the routine jobs each night of the East Peoria industry job was to enter track B-28 and pull out the cars that were in there and take them over to track 41, B-41, wasn't it?

A. Take them over to B-41 to the repair track.

Q. That job was done night after night?

A. Yes, sir.

Q. The routine of the switching job was always the same, wasn't it?

A. No, not always.

Q. Well, virtually the same?

A. Under the instructions of the yardmaster; practically the same every night.

Q. It involved taking the engine in there, coupling up all cars that were standing on the track, pulling them out and taking them over to the repair track, didn't it?

A. Yes, sir.

Q. And Tennant had worked with you on that same routine job many times before, hadn't he?

A. Yes, sir.

Q. And he worked with you as a pin puller on former occasions?

A. Yes, sir.

Q. He was familiar with the job, was he?

A. Yes, sir.

123 Q. On this night in question, July 12, 1940, I believe you said there was some other switching on some of the tracks in the "B" yard which took place before you went into B-28 that night?

A. Yes, sir.

Q. And isn't it a fact that the last job that you did before you went into B-28 was some job over on one of the smaller numbered tracks in the "B" yard?

A. Yes, sir.

Q. And after that was done, isn't it a fact that you told Switchman Tennant and Switchman Bonner that the next job would be to pull track B-28?

A. Yes, sir.

Q. And they both heard you, did they?

A. Yes, sir.

Q. And then you and Bonner started to walk across to B-28, didn't you?

A. Yes, sir.

Q. And Switchman Tennant rode on the footboard of the Diesel engine 200, didn't he?

A. Yes, sir.

Q. Was that the front or the rear end of the Diesel?

A. He rode on the front end of the Diesel.

Q. It's pretty hard to tell which is the front and which is the rear of the Diesel, isn't it?

A. Yes, sir.

Q. But the front end has a letter that indicates it's the front end, doesn't it?

A. I have never seen no letter on it.

Q. It has the letter "F". And you tell the front
124 end from the place where the engineer sits, don't you?

A. Yes, sir.

Q. And on that night he was sitting on the west, or river, side of the Diesel, wasn't he?

A. I didn't see him.

Q. The engineer?

A. The engineer? Yes, on the right hand side of the engine.

Q. So that meant that the front end of the Diesel would be the south end of it?

A. Yes, sir.

Q. Then the engine traveled light, that is, without any cars attached to it, over to track B-28—

A. Yes, sir.

Q. —with Tennant on the front footboard? And, to accomplish that, you had—the engine had to move up in what is called 20 lead or middle lead, and then reverse, and somebody had to throw the middle, or divide, switch called B-28 switch to get into track B-28?

A. Yes, sir.

Q. And that switch was lined for this engine, was it?

A. Well, he had to get off—

Q. And line it?

A. —and line it.

Q. And then the engine proceeded on into the track, did it?

A. Yes, sir.

Q. Do you know where the first car was that was standing in on that track? How far it was from the divide switch?

A. About a car's length.

Q. Who made that first coupling?

125 A. Tennant.

Q. Where were you at the time?

A. Walking up the track.

Q. Which side of the track?

A. The right hand side, the west side of the track.

Q. That's the river side?

A. Yes.

Q. Is track B-28 a straight track?

A. Yes.

Q. Perfectly straight, isn't it?

A. I don't know how perfect it is. It's straight.

Q. Where was Switchman Bonner at the time Tennant was coupling up the first car?

A. Switchman Bonner was on top of the cars letting brakes off.

Q. Switchman Bonner was known as the field man in the crew, wasn't he?

A. Yes, sir.

Q. And his job was to work along that cut, make couplings, release brakes?

A. Yes, sir.

Q. Did you see Tennant make the first coupling?

A. No, sir.

Q. How do you know that he made it?

A. Well, the cars was fastened onto the engine.

Q. I know, but how do you know Bonner didn't make the first coupling?

A. Bonner was with me. He didn't make the first coupling.

Q. There was nobody else to do it but Tennant, so you figured Tennant had made the first coupling?

126 A. Yes, sir.

Q. Did you see him again after that?

A. No, sir.

Q. Did you see his light any place up around the engine?

A. No, sir.

Q. You continued on down alongside the track?

A. Yes, sir.

Q. On the west side of the train, didn't you?

A. Yes, sir.

Q. I believe you said in your direct examination you were marking cars. What were you marking them for?

A. The loads from the empties.

Q. And you proceeded down the whole line of twenty cars marking them, did you?

A. Yes, sir.

Q. And after you got to the end of the last car you were about eight hundred feet from the engine, weren't you?

A. That's right.

Q. What did you do then?

A. Well, I waited for Bonner.

Q. What was Bonner doing?

A. Bonner was letting off brakes and coupling up the track.

Q. Did he finally tell you all the brakes were released?

A. Yes, sir.

Q. And the cars were all coupled up?

A. Yes, sir.

Q. After he told you that, what then did you do?

A. I walked up about to the fourth car and Bonner was with me at the time, and I gave a back-up signal.

127 Q. At the time you gave the back-up signal, did you see Tennant?

A. No, sir.

Q. Did you see his light any place?

A. No, sir.

Q. Where did you think he had gone?

A. Well, I didn't know unless he was with the engine.

Q. Where did he usually go?

A. Well, he usually rode on the footboard of the engine.

Q. What were his duties?

A. Well, his duties was to be there with the engine to line the switches out when we pulled out of the track.

Q. He had two duties to perform, didn't he, at that time? One being to see that the switches were lined up so the train movement could go on out on track 28 and get onto the lead? Wasn't that one of them?

A. That was one of them.

Q. The other duty he had was to keep alert and look out for his own safety? Wasn't that the other duty?

A. Yes, sir.

Q. And when you gave your signal, you assumed that he was following his duties, didn't you?

A. Yes, sir.

Q. I believe you testified that when the engine came in there on track B-28 the cars on that track were in two or three groups, and they had to be coupled together, is that right?

A. Yes, sir.

Q. And they were coupled together?

A. By my crew.

Q. And during the process of coupling up these 128 cars, the engine bell was not rung?

A. Yes, sir.

Q. You testified to that, didn't you?

A. Yes, sir.

Q. Is it the custom and practice in those yards to ring the bell while cars are being coupled up like that?

A. Only when they are stopped and moved, stop or start; whenever the engine starts and stops.

Q. In other words, when a coupling is made, the ordinary thing to do next is to slack the cars by having the engine pull back a little to see if the coupling has been made, isn't it?

A. Yes, sir.

Q. Is it the practice to ring the engine bell for that?

A. Well, not exactly.

Q. Then when the engine would push forward again to connect up with the next group of cars on the track, it wasn't the practice to ring the bell for that, either, was it?

A. Well, it wasn't the practice, no.

Q. And it all depended upon whether the engineer knew somebody was in a position of danger, didn't it, in those operations?

A. Just what's that question?

(Question read by reporter.)

A. Yes, sir.

Q. And in these operations of coupling up trains and slacking over there, which you did night after night after night, the engineer would not ring the bell unless he had actual notice that somebody was in a position of danger, isn't that right?

Mr. Eagleton: I object. The rule required the ring-
129 ing of a bell whenever the engine started up. I tried to show the rule was in force and effect at that time.

The Court: The objection is overruled. It is a matter of practice. He may answer.

A. Well, some men rang the bell and some didn't.

Q. Well, let's get down to it.

A. The majority of the men did.

Q. Let's get down to what England did. England was your engineer, wasn't he?

A. Yes, sir.

Q. And he didn't ring the bell while this train was being coupled up, did he?

A. No, sir.

Q. Did you go down and tell him he was making a mistake? That he should be ringing the bell?

A. No, I didn't walk clear back.

Q. You were in charge of the cut, weren't you?

A. Yes, sir.

Q. And you were in charge of England, weren't you? He was your engineer, wasn't he?

A. Yes.

Q. Did you notice he wasn't ringing the bell?

A. I didn't notice, no. I didn't notice.

Q. You weren't used to him ringing it, were you?

A. Yes, sir.

Q. In that kind of an operation?

A. Yes, we was used to hearing it different times.

Q. Coupling up a train?

A. Yes, sir.

130 Q. Well, you didn't hear it. How come you didn't go back and tell England about it?

A. Well, England was responsible for the man that was with him. I left Tennant with England, and he was responsible for him.

Q. Weren't you responsible for the whole crew?

A. I was responsible just the same as England.

Q. You were the top man on the crew, weren't you? Weren't you the leader of the whole crew?

A. I was the leader of the switchmen.

Q. You had a right to give orders to the engineer and switchmen both as to the switching operations that took place, did you not?

A. Yes, sir.

Q. At any rate, England wasn't ringing the bell, but you didn't find anything unusual about it that would cause you to go back and speak to him about it, did you?

A. After I got back quite a ways, I didn't walk back and run over some of these cuts and ask if a man gave a certain signal.

Q. The first coupling was made when you were right close by?

A. Yes, sir.

Q. That called for a slacking operation? Moving the engine back a ways?

A. Yes, sir.

Q. You didn't hear any bell then?

A. No, sir.

Q. You didn't say anything about it then, did you?

A. No, sir.

Q. As a matter of fact, that was the usual and customary method of switching, wasn't it?

A. Well, I can't say that. I can't answer that question.

131 Q. You have been over there a long time, haven't you, Harkless?

A. Yes, sir, I have been over there a long time.

Q. All right. Your memory seems to be pretty good about the night of the accident. Let's take the night before. You went in there just the same way the night before?

A. Yes, sir.

Q. And got the cars on track B-28, didn't you?

A. Yes, sir.

Q. On the night of July 11?

A. Yes, sir.

Q. And England was your engineer, and Tennant was your pin puller, and Bonner was your field man?

A. Yes, sir.

Q. When the cars were coupled up on this preceding night, England didn't ring the bell, either, did he?

A. He answered my signal.

Q. I didn't ask you that. Please answer my question.

A. No, he didn't ring the bell.

Q. And I suppose you walked back along the train and marked it just exactly as you did on the night of July 12, didn't you?

A. Yes, sir.

Q. When you had completed marking it, you gave the signal to England to pull out or reverse his engine?

A. Yes, sir.

Q. And he complied with your signal, didn't he?

A. Yes, sir.

Q. I am talking about the night of July 11. He didn't ring a bell that night, either, did he?

A. I just don't recollect that night.

132 Q. Well, if he had rung the bell it would have surprised you, wouldn't it?

Mr. Eagleton: I object to the form of the question as argumentative.

The Court: He may answer whether it would or not.

A. No, it wouldn't have surprised me.

Q. Well, if he had rung the bell when he started to pull out, it would have meant somebody was in a position of danger, wouldn't it? Isn't that what that bell ringing would mean to you?

A. No.

Q. Well, now, you have worked with England for four months on that job? Didn't you?

A. Yes, sir.

Q. How many of the nights prior to July 12 in that period would you say that you heard England ring the bell when he backed that cut out of track B-28?

A. Well, he rang it some of the time, probably half of the time.

Q. When he rang it, for what purpose, if you know, did he ring the bell?

A. Well, to warn other crews of engines—of other engines—and pedestrians around, yard clerks.

Q. But the men on your crew were supposed to know

all about the movement, and did know all about the movement, didn't they?

A. They knew all about the movement, yes.

Q. On this particular night again, July 12, 1940, you told Tennant that the next job was to pull track B-28?

A. Yes, sir.

Q. And he went in there, and you say made the first coupling, is that right?

133 A. Yes, sir.

Q. And then his next duties were to walk back and see that the switches were lined or stay with the engine and observe care for his own safety? Those were his duties, weren't they?

A. Yes, sir.

Q. He had had a great deal of experience in this particular switch movement, hadn't he?

A. Well, he had three or four nights' experience.

Q. And then the previous times he worked with you he had that experience?

A. Yes.

Q. He knew exactly what was going to be done, didn't he?

Mr. Eagleton: I object to that.

The Court: Yes, objection sustained to that question.

Q. He knew from his experience? He had reason to know what England's practices were as to ringing that bell, didn't he?

Mr. Eagleton: I object to what he knew.

The Court: Objection sustained. It is a question for the jury, calls for a conclusion.

Q. At all events, on all the occasions he worked as a member of that crew his duties were always up around with the engine?

A. Yes, sir.

Q. Where he was in a position to know what the practices of the engineer were as to ringing the bell?

Mr. Eagleton: I object, if the court please.

The Court: Objection sustained. It calls for a conclusion.

Q. Now, on the night of July 12 at the time all these cars were coupled together and you gave the signal to

134 England to reverse, Tennant was not in sight, was he?

A. No, sir.

Q. The engineer complied with your signal, didn't he?

A. Yes, sir.

Q. Was there any necessity to relay that signal through Tennant?

A. No, sir.

Q. On those straight tracks over there in the East Peoria yards, the foreman usually gave the direct signal to the engineer, didn't he?

A. Yes, sir.

Q. And that is what you did that morning?

A. Yes, sir.

Q. And that was a usual and a proper thing for you to do, wasn't it?

A. Yes, sir.

Q. In other words, the engineer didn't have to have that signal relayed to him by the pin puller?

A. No, sir.

Q. So the pin puller didn't have to be there for that purpose, did he?

A. No, sir.

Q. And on that occasion England complied with your signal and the cut started pulling out, didn't it?

A. Yes, sir.

Q. Do you know how Tennant was run over?

A. No, sir.

Q. Could he have been standing in front of the engine between the rails when the engine started up?

Mr. Eagleton: I object as speculative, and it invades the province of the jury.

135 The Court: Objection overruled. He may answer that.

A. Well, he could have been standing near the engine.

Q. That is, in front of the engine?

A. Well, I was twenty car lengths away. I didn't know—.

Q. You didn't see his light, did you?

A. No, I didn't see his light.

Q. That might have been one possibility? That he was around the front of the engine?

Mr. Eagleton: I object as being speculative.

The Court: Objection sustained.

Q. In other words, if he had been standing at the side of the engine you could have seen his light, couldn't you?

A. Yes, sir.

Q. But you didn't see his light?

A. No.

Q. Would it have been possible for Tennant to be stand-

ing on the footboard when the engine started out and lost his balance in some way?

Mr. Eagleton: I object, if the court please.

The Court: Objection sustained.

Q. Well, would that have been a place where he could have stood?

A. Yes, sir.

Q. There are hand holds on that end of the Diesel, aren't there?

A. Yes, sir.

Q. On both ends of it?

A. Yes, sir.

Q. As far as you know, those hand holds were all in order, weren't they, and good condition?

A. Yes, sir.

136 Q. Would it be possible for Tennant to have gone around to the north of the engine and climbed up on the drawhead and sat down?

Mr. Eagleton? I object as speculative.

The Court: Objection sustained as to what would be possible. I think you can show what the condition was.

Q. Was there a place on the top of the drawhead of the Diesel where a man could sit down?

A. Yes, sir.

Q. What that a proper place for a man to sit?

A. No sir.

Q. Could a man have walked clear around the engine on that night and come back on the east side of the cut and tried to climb through?

Mr. Eagleton: I object as speculative.

The Court: Objection sustained, what he could have done.

Q. Was it a possible way for Tennant to have been injured? To have walked around the north end of the engine and back on the east side of the cut, and then attempted to climb through the cars?

Mr. Eagleton: I make the same objection for the same reason.

The Court: I think he may answer that.

A. Well, yes, he could have walked around the engine.

Q. And switchmen sometimes do that, don't they?

A. Sometimes.

Q. In other words, there were several possible ways that Tennant might have been injured?

137 Mr. Eagleton: I object to that, if the court please.

The Court: Objection sustained to that.

Q. You don't know of your own knowledge how he was injured, do you?

A. No, sir.

Q. I want to ask you this, too: Whether before the Diesel would move out and move after it had been standing still, whether the engineer didn't always release the air?

A. Yes, he would have to release the air to move the engine.

Q. And didn't the release of the air make a noise?

A. Well, I don't know. It could have that night, and it could have not.

Q. Have you been around close to the Diesel when the air was released by the engineer?

A. Yes, sir.

Q. What kind of a noise did it make when the air was released?

A. Just kind of a whizzing sound.

Q. And anybody standing around the engine could hear that, couldn't they?

Mr. Eagleton: I object. No evidence it was released on this occasion.

The Court: He may answer.

Mr. Horton: He said the engine couldn't be moved without releasing the air.

The Court: He may answer. Read the question.

(Question read by reporter.)

A. Yes, sir.

Q. Wouldn't that be a warning to any reasonable person that the engine was about to move?

Mr. Eagleton: I object to that, if the court please: 138 invading the province of the jury.

The Court: Objection sustained.

Q. The engine never moved without the air being released, did it?

A. No, sir.

Q. What was the next thing the engineer did after he released the air before he could move the engine?

A. Well, he would have to start the motors.

Q. That would make a noise, too, wouldn't it?

A. Yes, sir.

Q. That would be an additional warning that the engine was about to move?

A. Well, on this engine it run all the time. It was an electric engine.

Q. Well, now, just take this particular night in question. This Diesel, after the cars had all been coupled on track B-28, was standing still, wasn't it?

A. Yes.

Q. And the air brakes were set, weren't they?

Mr. Eagleton: If you know.

A. If I know, yes.

Q. They were always set, weren't they? The engineer always stopped the engine with air, didn't he?

A. Yes.

Mr. Eagleton: I object, unless he knows.

The Court: Objection overruled. He said he does.

Q. That engine was headed south and, in order to obey your signal, he had to reverse the engine, didn't he?

A. Yes, sir.

Q. So what was the first thing he would do after he 139 got your signal? He would release the air, wouldn't he?

A. Yes, sir.

Q. And the next thing he would do would be to shift the gear and put the Diesel in reverse, isn't that right?

A. Yes, sir.

Q. Then his next movement would be to take hold of the throttle and open the throttle, is that right?

A. Yes, sir.

Q. There are three things that that engineer had to do: First, release the air. He did that by taking hold of a certain valve, didn't he?

A. Yes, sir.

Q. And the next thing he had to do was put the gears in reverse? He did that by taking hold of another lever, didn't he?

A. Yes, sir.

Q. And the last thing he did was to open the throttle?

A. Yes, sir.

Q. And it was necessary for him to do those things to comply with your signal on the night of July 12 to pull that cut of cars out of track B-28, wasn't it?

A. Yes, sir.

Q. When the air is released, it makes a hissing sound, doesn't it?

A. Yes, kind of a hissing sound.

Q. And you can hear it sometimes a car length away, can't you?

A. Yes, sir.

Q. From the investigation that you made after this ac-

cident, do you think that Tennant was run over about where the engine had been standing?

Mr. Eagleton: I object to that, if the court please.

140 The Court: Objection sustained.

Mr. Eagleton: Invading the province of the jury.

The Court: Objection sustained.

Q. You figured out that the train had pushed in seven or eight car lengths in coupling up that track that night, didn't you?

A. Yes, sir.

Q. And seven times forty would be two hundred and eighty feet, wouldn't it?

A. Something like that.

Q. Did you measure the distance from the B-28 switch to where the blood and the hand were found, and the lamp?

A. I stepped it off. I didn't measure it.

Q. About how far was that?

A. Well, I don't just remember how many steps it was, but—

Q. About how far, in feet, approximately?

A. Oh, approximately three hundred feet.

Q. On previous occasions in this same switching crew England would not ring the bell, you say, on about fifty per cent of the occasions, is that right?

A. That's right.

Q. And you and Bonner and Tennant were all familiar with the switching operation that took place every night in taking the cars out of track B-28?

Mr. Eagleton: I object, what is in somebody else's mind.

The Court: It is repetition. I think you have gone over that. Objection sustained.

Q. Now, with reference to what other people did in the yard, first I want to ask you if the East Peoria yards are not a large railroad yard?

141 A. Well, not as large as I've seen.

Q. Well, it's about a mile and a quarter long, isn't it?

A. Yes, just about a mile and a quarter.

Q. It has forty-two tracks in width, is that right?

A. Yes, sir.

Q. And there are a number of diagonal lead, ladder, tracks that go through it at various places?

A. Yes, sir.

Q. And the yard is divided up into "A" yard and "B" yard by these ladder tracks, isn't it?

A. Yes, sir.

Q. And there are always a number of switch engines working over there, aren't there?

A. Yes, sir.

Q. What do those engines do over there, principally? What kind of switching is done over there?

A. Well, short switching; classifying, too. One yard is a classification yard for outbound trains, and the other is a classification yard for inbound trains.

Q. Foreign line engines bring trains of cars into the East Peoria yards, do they not?

A. Yes, sir.

Q. And then they cut off and leave them there?

A. Yes, sir.

Q. Then the P. & P. U. switch engines break up those trains, don't they?

A. Yes.

Q. And they classify those cars down into different tracks, don't they?

142 A. Yes.

Q. And later on engines come up and take the cars that go to a certain railroad or industry, and take them where they should go?

A. Yes, sir.

Q. And then other cuts are brought over there and broken up and classified for outgoing trains, aren't they?

A. Yes, sir.

Q. And that is going day and night, isn't it?

A. Yes, sir.

Q. And there are always a large number of engines in those yards, aren't there?

A. Yes, sir.

Q. If they were all ringing the bell every time they moved there would be a lot of confusion?

Mr. Eagleton: I object, being speculative.

The Court: Objection sustained.

Q. Well now, what has been your observation over there as to whether all those engines rang the bells every time they move?

A. Well, they have to ring the bell or blow a whistle to warn one another, to keep out of one another's road, and they do it.

Q. That's what they do it for, isn't it?

A. Yes, sir.

Q. They don't do it to warn members of the crew each time they are going to back up to couple onto some cars, do they?

A. Yes, sir.

Q. They do that for the purpose of warning crew members standing there taking care of the operation?

A. Well, for the other members of the company, too; for the safety of the members of other companies.

143 Q. You mean for the safety of the crews of other engines?

A. Yes, sir.

Mr. Horton: Maybe we had better suspend.

The Court: You may be excused until 2 o'clock this afternoon.

Trial Recessed at 12:30 o'clock P. M.

Trial Resumed at 2 o'clock P. M.

The Court: Have the witness take the stand. You haven't quite concluded, have you?

Mr. Horton: Not quite.

Cross-Examination of Mr. Harkless by Mr. Horton (Resumed).

Q. On the night of July 12, 1940, at about 2 o'clock in the morning, which way was the wind blowing?

A. Well, I couldn't tell you right now.

Q. When you gave a signal for the engine to back out of that track you were eight hundred feet away from it, weren't you?

A. Yes, sir.

Q. And if the wind had been blowing away from you, you couldn't have heard the bell if it had been ringing?

A. On this particular engine you can hear this bell for a hundred car lengths away.

Q. You didn't answer my question. If there was a wind blowing away from you toward the engine, and you were eight hundred feet away, do you think you could have heard that bell?

144 A. Yes, sir.

Q. After you had completed marking cars and were down there at the other end of the train, and gave a signal to the engineer to pull the cars out of the track, that was a proper signal for you to give, was it?

A. Yes, sir.

Q. And it was proper of him to obey it, wasn't it?
A. Yes.
Q. He did obey it, didn't he?
A. Yes, sir.
Mr. Horton: That's all.

Redirect Examination by Mr. Eagleton.

Q. Mr. Harkless, was it proper for the engineer to obey that signal and move the engine providing a member of the crew was missing and his light in a position when it coulda't be seen at that time?

Mr. Horton: I object to that as assuming something did exist of that nature. We don't know if that existed.

The Court: Read the question.

(Question read by reporter.)

The Court: Objection sustained. I think that is a conclusion purely of this witness. He testified to things required.

Mr. Eagleton: I was asking with reference to the last question asked by Mr. Horton, Your Honor.

Q. When you say it was proper for the engineer
145 to obey your signal, I will ask you if you mean by that it was proper provided he knew where the man was, or could tell where he was.

Mr. Horton: I still object to it. You are asking for an assumption of something not in evidence.

Mr. Eagleton: A qualification of his answer.

The Court: I think the objection will be sustained. He testified to what the custom was, and it was answered.

(Out of the hearing of the jury:

Mr. Eagleton: I have a special reason. I wish to prove by the witness—If permitted to answer, the witness will state it was improper to move the engine unless the engineer knew the whereabouts of the members of the crew, including Harold C. Tennant, on the night in question, and at the time in question.

The Court: Make your objection.

Mr. Horton: I object to the testimony offered on the ground it calls for a conclusion and an assumption of testimony that's not in the case.

The Court: Objection sustained.

Mr. Eagleton: I except to the ruling.

The Court: You won't need to except. It is understood you except.)

Q. Did you know the whereabouts of Harold C. Tennant at the time you gave the signal?

A. No, sir.

Q. With reference to the ringing of the bell and the rule that has been read in evidence, rule number
146 30, did your superiors ever tell you there was any modification to that rule, or that it would be rescinded under any circumstances, or that it must be obeyed? Which?

A. Must be obeyed.

Q. Was that true down to the day of the accident?

A. Yes, sir.

Q. When you spoke about the other engineers other than England, what was the fact with reference to the other engineers? You said something about a majority of them. Did the majority of them ring the bell when the engine was about to start from a stationary position under those circumstances or not?

A. Yes, sir.

Mr. Horton: I object to that.

The Court: Under what circumstances?

Mr. Horton: Under what circumstances?

Q. Where the engine had stopped on a track and was about to start in motion, would they always ring a bell?

A. Yes, sir.

Q. With reference to any other engine that may have been in the B yard at the time this accident occurred, was there any other engine in the B yard working there that you know of? Working at the time this accident occurred?

A. Not that I know of.

Q. You said something in your cross examination about the first car that was on B-28, that it was south of the divide switch. When you use the terms "divide switch", does that have reference to the same switch we have been talking about, the switch at B-28 where the body was found?

A. Yes, sir.

147 Q. And you say that the first car that was coupled on to that, that is, the car nearest to the north, was about a car length south of that switch?

A. Yes, sir.

Q. Before it was coupled to it?

A. Yes, sir.

Q. Now, Mr. Harkless, your deposition was taken in this case, was it?

A. Yes, sir.

Q. On December 5, I think here in the Judge's chambers?
A. Yes, sir.
Q. You were sworn and put under oath?
A. Yes, sir.
Q. And Miss Reynolds, the reporter, transcribed your testimony?
A. Yes, sir.
Q. Mr. Horton was present at the time your deposition was taken?
A. Yes, sir.
Q. And did Mr. Horton thereafter, just a short time ago, on April 3, serve notice to take your deposition again?
A. Yes, sir.
Q. Were you brought back to the same chambers there with Miss Reynolds present to take the testimony?
A. Yes, sir.
Q. And you testified then?
A. Yes, sir.
Q. That is April 3. Did Mr. Horton, immediately prior to April 3—April 3 was on what day of the week? Do you recall?
A. I believe it was on a Tuesday.
Q. Friday, wasn't it? Do you recall?
148 A. It was a Friday.
Q. Now, did Mr. Horton, in that same week, a day or two prior to April 3 when your deposition was being taken, about to be taken at his request and under his subpoena, did he come to your home to visit you?
A. Yes, sir.
Mr. Horton: I object as being improper redirect examination.
The Court: Objection sustained.
Q. On two or three days prior to the time that deposition was set, did Mr. Horton come to see you at your home?
A. Yes, sir.
Q. What day of the week was it? Do you recall?
A. I believe it was on a Wednesday.
Q. You were already under subpoena to testify?
A. Yes, sir.
Q. Did Mr. Horton at that time make any effort to get you to swear falsely?
Mr. Horton: I object to that.
The Court: Objection sustained.
Q. I will ask you what he said.
Mr. Horton: I object to that, and ask that the question

be stricken, and I ask that the jury be instructed to disregard it.

The Court: The question may be stricken, and the jury instructed to disregard it.

Q. I will ask you what he said, if anything, in regard to promises that would be made if you testified in favor of the company, and what would be done in the event you testified for the plaintiff.

149 Mr. Horton: I object to the form of the question.

The Court: I think he may answer that.

A. Well, he came there along in the afternoon, and him and I was in a room alone, and he told me if I would go along with the company he would see that I got a job and my leg taken care of, but I haven't seen the job yet.

Q. What else, if anything, did he say?

A. And he would give me a fair settlement for my leg.

Q. Did you testify about that matter in substance when your deposition was taken?

A. Yes, sir.

Q. Now, Mr. Horton asked you something about whether or not you ever solicited a case for me. When was the first time you ever saw me in your life?

A. Well, along in July.

Q. How did you happen to come to see me?

A. Through my own case.

Q. Because I was the attorney for the Brotherhood at St. Louis?

A. Yes.

Q. Did you write to me first to make an appointment?

A. Yes, sir.

Q. Had you ever seen me before that time in your life?

A. No, sir.

Q. Did I or did Mrs. Tennant or anyone else at any time ever promise you as much as one penny if you would testify falsely?

A. No, sir.

Q. Did I or anyone else or Mrs. Tennant ever promise you if the case was won or lost, in any event you would be paid one cent?

A. I was promised nothing.

150 Q. When you came to St. Louis you stayed at the Majestic Hotel, did you?

A. Yes, sir.

Q. And Mrs. Tennant came with you?

A. Yes, sir.

Q. And she stayed, of course, in separate quarters in the same hotel, is that right?

A. Yes, sir.

Q. Do you know of a single case that I have ever handled or know a person connected with a single case I have ever handled that you know about in your life except this Tennant case?

A. No, sir.

Q. Prior to the time that Mr. Horton came to see you that afternoon and told you what you say he told you, had the assistant superintendent been out there that same day?

A. Yes, sir.

Q. Who is he?

A. Mr. Keeler.

Q. Your case, your injury, had occurred on November 25, 1940?

A. Yes, sir.

Q. When they were talking to you, it was three days prior to the time your deposition was set, is that it?

A. Yes, sir.

Mr. Eagleton: I believe that's all.

The Court: Cross-examine.

Recross Examination by Mr. Horton.

Q. Did I ever ask you to testify falsely in this case?

151 A. You asked me to go along with the company.

Q. I didn't ask you to testify falsely, did I, Mr. Harkless?

A. Well, I can't say whether you did or you didn't.

Q. I asked you to tell the truth, didn't I, Mr. Harkless?

A. That's right.

Q. You had a claim pending against the company when I came down to see you, didn't you?

A. Yes, sir.

Q. I came down there and talked settlement of that claim of yours, didn't I?

A. Yes, sir.

Mr. Horton: There is a matter of cross-examination that I forgot, Your Honor.

The Court: You may inquire.

Cross-Examination (Continued) by Mr. Horton.

Q. Mr. Harkless, I will ask you if on July 12, 1940, the next morning after this accident, you weren't called in to the office of the superintendent to give your statement as to how this accident had occurred? Were you called in?

A. Yes, sir.

Q. And did you give your statement at that time?

A. Yes, sir.

Q. In whose presence?

A. The presence of the assistant superintendent and the stenographer.

Q. And was the name of the assistant superintendent or chief clerk, was that Sidney Keeler?

A. Yes, sir.

Q. What was the name of the stenographer?

152 A. Marie Willms.

Q. Did she take down your statement in shorthand as you gave it?

A. Yes, sir.

Q. And then did she reduce it into writing—

A. Yes, sir.

Q. —on the typewriter? I hand you Defendant's Exhibit for identification number 1, consisting of three sheets of typewritten paper. I will ask you if that is the statement to which you refer.

A. Yes, sir.

Q. And is that your signature on each of those three pages?

A. Yes, sir.

Q. Did you put it there?

A. Yes, sir.

Q. In the presence of Mr. Keeler?

A. Yes, sir.

Q. I will ask you if at the time this statement was taken you said the following:

"At the time our engine headed in onto B-28, Switchman Tennant coupled onto the first car which stood about forty feet south of the switch points. We took the slack to see whether the cars were all together and found a separation between the second and third cars so slacked the engine back six or eight feet while Bonner opened the knuckles, then moved ahead and made the coupling between the second and third cars, this giving us nine empties coupled to the engine which it was necessary to shove south

about five or six car lengths to couple onto other cars on the track."

Did you made that statement at that time?

153 A. Yes, sir.

Q. And was it true when you made it?

A. Yes, sir.

Q. And did you make the further statement at that time: "I was busy marking the cars while Switchman Bonner was making the couplings and releasing the brakes. It was straight track which did not make it necessary for Switchman Tennant to be in a position to relay signals to the engineer. Ordinarily it is the duty of the man following the engine, which in this case was Tennant, to remain near the engine to transmit or relay signals, line switches, couple engine onto cuts, etc. In this case he performed the first duty in coupling onto the first car of cut, after which he should have lined the route for us to use the East Peoria Industry lead instead of the Nickel Plate Main, which was the track we used coming back from the TP&W."

Did you make that statement at that time?

A. Yes, sir.

Q. And was it true when given?

A. Yes, sir.

Q. Then did you make the further statement at the same time:

"He would have had to line only the first crossover switch to the lead. I did not see him after he coupled onto the cut and do not know what he did from that time as I was busy in the performance of my duties and he had worked with me long enough to know the routine that is followed in handling this cut which we usually did each night about the same time."

Did you make that statement at that time?

A. Yes, sir.

Q. And was it true when given?

154 A. Yes, sir.

Q. And did you make this statement at that time: "In coupling onto the track and making the various connections there were no unusually rough starts or stops and when the cut started after all cars were together it was the ordinary starting. I later examined the footboards on both ends of the Diesel 200 in an effort to determine how the accident occurred and could find no evidence of a shoe having slid on the board or any evidence of any kind which

would develop how the accident occurred. I know the headlights were burning on both ends of Diesel 200 and I did not hear the bell ringing although, of course, it would not be kept ringing all the time we were standing on the track making couplings, etc., neither did I hear any whistle signals given as Engineer England promptly started upon receipt of my back-up signal, the Diesel having been headed southward, so I knew he had gotten the signal."

Did you make that statement at that time?

A. Yes, sir.

Q. And was it true when given?

A. Yes, sir.

Q. Now, Mr. Harkless, I have in my hands Plaintiff's Exhibit A, Peoria and Pekin Union Railway Company, transportation rules, January 1, 1929. I will ask you if you were familiar with these rules.

A. Well, not so good. I know the most important ones in there.

Q. Well, before a man can go to work on the railroad in the operating end of it he has to pass an examination on these rules, doesn't he?

A. Yes.

155 Q. And then he is examined from time to time after that, isn't he?

A. Yes, sir.

Q. I want to call your attention to rule 32 of these transportation rules, as follows: "The unnecessary use of either the whistle or the bell is prohibited." Did you know that rule was in the book?

A. Yes, sir.

Q. That follows along after rule 30 that you have testified about, doesn't it?

A. Yes, sir.

Q. Well, what is unnecessary use of the whistle or bell that they prohibit?

A. Continually ringing it.

Q. In other words, constant ringing of the bells in the East Peoria yards is prohibited, isn't it?

A. Yes, sir.

Mr. Horton: That's all.

Redirect Examination by Mr. Eagleton.

Q. Mr. Harkless, with reference to rule 32 and with reference to the statement from which Mr. Horton read, are

you conscious of having said anything on this stand which refutes anything in this statement at all?

A. The question, please.

Q. Did you at any time on the stand ever refute anything in this statement at all?

A. No, sir.

Q. Or testify to anything contrary?

156 Mr. Horton: I object as calling for a conclusion.

The Court: He may answer.

A. No, sir.

Q. With reference to 32, I notice in this statement you say—You didn't write up the statement, did you?

A. No, sir.

Q. You signed it after it was written up?

A. Yes.

Q. With reference to the ringing of the bell, "I did not hear the bell ringing although, of course, it would not be kept ringing all the time we were standing on the track"—

Mr. Horton: Read the whole thing.

Mr. Eagleton: Just a minute, please!

Mr. Horton: I object to asking unless he reads the entire answer solid to the witness.

Q. Mr. Harkless, with reference to that, and with reference to rule 32, do you ring a bell constantly while the engine is standing on the track? Do you ring constantly, or is that prohibited by rule 32 as unnecessary?

A. That is prohibited.

Q. But when you are about to start up, I will ask you, in the requirement of rule 30, you must ring a bell?

A. Yes, sir.

Mr. Eagleton: I believe that's all.

Recross Examination by Mr. Horton.

Q. Those are your own personal views at the present time, is that right?

157 A. What's that?

Q. Those are your own personal views at the present time?

Mr. Eagleton: I object.

The Court: He may answer.

A. No, sir.

Q. The answer that you just gave as to the interpretation of these rules is your own interpretation, isn't it?

A. No, sir, they're not. We're supposed to obey by those rules. That's what the company gives you.

Q. You are talking about what your notion of these rules is right now, aren't you?

A. That is the meaning of the rules.

Q. According to the way you interpret them, is that right?

A. Printed there in English.

Mr. Horton: That's all.

158 MARY TENNANT, the plaintiff, recalled, and having been previously sworn, resumed the stand and testified further as follows, in answer to

Direct Examination by Mr. Eagleton.

Q. I will ask you if you at any time ever promised Mr. Harkless or anyone else one penny in the event they testified favorably to you or assisted you in any way?

A. I did not.

Q. I will hand you a letter with an envelope, marked July 8, postmarked Peoria, addressed to me, with a letter, July 8, 1941, and ask you if that is the letter that you wrote to me from Peoria asking for an appointment to be made for you.

A. Yes, it is.

Q. Did Mr. Harkless ever at any time solicit you or ask you or request you to come to St. Louis to see me?

A. No, sir.

Q. This was in 1941, in July, a year after your husband had been killed, was it?

A. Yes, sir.

Q. Was it your understanding at that time, as indicated by the letter, that your year was the last time within which you could bring a suit?

A. Yes, sir.

Q. And the year was up, you thought, on July 12?

A. Yes, sir.

Mr. Eagleton: I believe that's all.

Mr. Horton: May I see that?

159 Mr. Eagleton: Yes.

(Mr. Horton examines same.)

Cross-Examination by Mr. Horton.

Q. Who told you about Mr. Eagleton?

A. Well, Mr. Harkless did. I met him downtown, and I asked him how his leg was getting along, and he said he had been to St. Louis to see an attorney, and I asked him who, and he said, "Mr. Eagleton". That is how I come to know about it.

Mr. Horton: That's all.

Mr. Eagleton: That's all.

Mr. Horton, I would like for you to take the stand.

(Discussion between court and counsel out of the hearing of the jury.)

160 SHELDON MORRIS HARKLESS, recalled, and having been previously sworn, resumed the stand and testified further as follows, in answer to

Direct Examination by Mr. Eagleton.

Q. Mr. Harkless, whenever an engine was standing still and the bell was sounded preparatory to its starting up, how did you interpret that sounding of the bell? What did it mean to you as a member of the crew such as this crew that night?

A. Well, it meant to warn everybody around the engine.

Q. That it was about to move?

A. Yes, it was about to move.

Mr. Eagleton: I believe that's all.

The Court: Any further cross examination?

(Out of the hearing of the jury:

Mr. Eagleton: I have called Mr. Horton as a witness and the court believes he should not be called and has so indicated, and I offer to prove by Mr. Harkless,—I mean Mr. Horton—after he testified on January 12 of this year at Springfield, Illinois, he told me after the deposition of Harkless was taken that he felt confident that, by offering Harkless the right amount in settlement, he could induce him to change the testimony he had previously given by deposition on December 5, 1941.

The Court: Let the court inquire: Does counsel desire to testify in this case? I think it is entirely up to you. As far as I am concerned, I don't think it is proper.

161 Mr. Horton: I wish to state that Mr. Eagleton is seeking to take advantage of a social conversation, and I think it's very irregular and unethical, and the implications are uncalled for and untrue. I object to it, and ask that it—

The Court: Objection sustained. I don't think it is proper.

Mr. Eagleton: (Except.)

Mr. Eagleton: I want to offer in evidence the defendant's answer to the amended complaint filed in this cause under date of February 5, 1942.

The Court: It is already on record.

Mr. Eagleton: I didn't know whether you had to offer it. I didn't know.

The Court: No, it is a part of the record and may be read from.

Mr. Eagleton: Plaintiff desires to offer in evidence plaintiff's Request for Admission of Facts and the defendant's answer thereto. This is the second one that was filed. We offer it in evidence, if the court please.

The Court: Any objection? I still think that is a part of the record.

Mr. Horton: I understand those are files.

The Court: Any objection to it? I think it may be admitted. I thought it was a part of the record.

Mr. Eagleton: It is plaintiff's Request for Admission of Facts, filed March 30, 1942, the original shows, and reads as follows:

162 "Comes now the plaintiff and requests the defendant to admit the truth of the following relevant matters necessary to establish the allegations in plaintiff's complaint:

"1. That defendant, as a common carrier of goods and freight, did, on the 12th day of July, 1940, and for a long time prior thereto, handle cars in its yards in Peoria and East Peoria, Illinois, some of which cars originated at points outside of the State of Illinois and other of which cars were destined to points beyond the State of Illinois."

I will read, in connection with that, defendant's response to that allegation:

"Defendant admits the statement set forth in paragraph 1 thereof", which has just been read.

By its response to plaintiff's second request for admission of facts filed in this court on April 10, 1942, second paragraph:

"That the deceased, Harold C. Tennant, on July 9, 10, 11 and 12, 1940, was employed by the defendant, working as a member of a switching crew, the foreman of which crew was S. M. Harkless, and that said Harold C. Tennant and the said crew were required on said days, as a part of their duties, to handle and move cars, some of which originated at points outside of the State of Illinois and other of which cars were destined to points outside the State of Illinois."

Defendant, in its admission with reference to that paragraph, states:

163 "Defendant admits the statement set forth in paragraph 2 thereof."

"3. That within a few hours prior to the death of said Harold C. Tennant on the 12th day of July, 1940, the aforesaid crew did deliver to the Toledo, Peoria & Western Railway Company a group of approximately thirty (30) cars, and that some of said cars originated at points outside the State of Illinois and other of said cars were destined to points outside the State of Illinois."

Defendant's admission with reference to that is as follows:

"Defendant admits the statement set forth in paragraph 3 thereof."

"4. That shortly prior to the death of said Harold C. Tennant, he was working with the aforesaid crew, coupling up a track in defendant's yards at East Peoria, Illinois, known as Track B-28, and that said track then and there contained the following cars:"

They are listed. I won't take time to read them, but among them are 9160 N. K. P. and 2131 E. R. D. X.

With reference to that allegation, number 4, "defendant admits the statement set forth in paragraph 4 thereof".

"5. That some of the aforesaid cars originated at points outside the State of Illinois and some of said cars were destined to points outside the State of Illinois."

With reference to that: "Defendant admits the statement set forth in paragraph 5 thereof."

I want the record to show all of the cars, although I have dispensed with the reading just to save time.

164 The Court: The record may show it.

(Note: Said list is as follows:

Car No.	Initial
38271	B. & O.
163121	I. C.
87068	N. K. P.
50248	C. & N.
24522	C. & A.
2897	C. I. Z.
26980	N. Y. C.
26968	—
43401	C. & N.
24539	L. N.
112	DUP. X
360470	St. P.
47019	C. & N. W.
42631	—
47507	—
43077	—
9160	N. K. P.
2131	E. R. D. X.
49613	S. P.
65471	G. N.)

Mr. Eagleton: I now offer, if the court please, in evidence plaintiff's request for admission of facts dated February 17, 1942, the parts thereof that were admitted unqualifiedly:

"2. That on the 12th day of July, 1940, at or about 2:00 a. m., the aforesaid Harold C. Tennant was in the employ of the defendant in its yards at Peoria and East Peoria, Illinois, and had been employed by defendant for a number of years prior to said time and date."

The Court: Any objection?

Mr. Horton: I am going to object to this unless he offers it all.

The Court: It may all be offered.

Mr. Eagleton: The parts that were admitted. I don't offer those that were challenged.

165 The Court: There wouldn't be any point in that. If there is anything in there that is material, counsel for defendant may offer it but, as it stands now, these particular ones will be allowed.

Mr. Horton: I think someone should explain how these admissions of fact must be made under the rules of this court.

The Court: I think that can be done by instruction. Certain requests were made on the part of the plaintiff, and the court orders the defendant to answer those certain requests if it can do so, either answer it is true or untrue, or that they have no particular knowledge in regard to it. That is the way the issue is made up.

Mr. Eagleton: And that the purpose is to dispense with the proof of those matters, and that they take the place of proof that must otherwise be made.

The Court: That is right.

Mr. Eagleton: "That on the 12th day of July, 1940, at or about 2:00 a. m., the aforesaid Harold C. Tennant was in the employ of the defendant in its yards at Peoria and East Peoria, Illinois, and had been employed by defendant for a number of years prior to said time and date."

"Defendant admits the matters set forth in Paragraph 2 thereof."

"5. That at the time of said injury, and for years prior thereto, the defendant was a corporation duly organized and existing under and by virtue of law.'

166 That's admitted.

"10. That at the time of his aforesaid injury on the said 12th day of July, 1940, the said Harold C. Tennant was a member of a switching crew, the foreman of which was S. M. Harkless, the engineer of which was Thomas England, and the engine being used by said switching crew was Engine No. 200."

That's admitted.

"15. That the aforesaid crew, shortly before the injury and death of the said Harold C. Tennant, was coupling up the cars then on Track B-28 in the defendant's yards at East Peoria, Illinois."

"Defendant admits the statement of facts set forth in paragraph 15 of said request."

"18. That prior to the said 12th day of July, 1940, the defendant did promulgate certain transportation rules governing the movement of trains, engines and cars, and the employees employed by the defendant in connection therewith upon its properties, and did publish said rules in a small book entitled 'Transportation Rules,' dated January 1, 1929."

That's admitted.

The plaintiff may rest.

The Court: The jury may retire.

(Jury retires from court room.)

Mr. Horton: If the court please.

The Court: Mr. Horton.

Mr. Horton: I would like at this time to present a
167 motion to instruct the jury to find the defendant not guilty. I have a formal motion in writing here, and the formal parts of which I will not read but, as grounds for the making of this motion, it says:

"1. The plaintiff has failed to prove the allegations of the Amended Complaint.

"2. The plaintiff has failed to prove negligence on the part of the defendant by substantial evidence.

"3. The plaintiff has failed to produce substantial affirmative proof that the defendant was negligent, and that such negligence was the proximate cause of the fatal injury.

"4. The evidence introduced on behalf of plaintiff leaves the cause of the fatal accident uncertain and conjectural.

"5. The Court should not allow the issues to go to the Jury since it appears from the evidence that the fatal accident may have occurred in several different ways, and since it is left in doubt and uncertain whether decedent was injured through his own negligence, or as a proximate result of some negligence on the part of defendant.

"6. Plaintiff's testimony leaves the cause of the death of decedent uncertain and shows that any one of a number of things may have brought about his injuries, for some of which the employer is not responsible, and it is not for the Jury to guess between these various causes and find that the negligence of the defendant was the real cause of the fatal injuries."

168 In addition to those grounds set forth in the motion, I would like to comment just a minute on the evidence.

(By direction, arguments on said motion not transcribed.)

The Court: I believe it is a question of fact for the jury. The motion will be overruled.

We will take a recess.

(Recess.)

(Jury returns to court room.)

169 Whereupon, the defendant, to maintain the issues in its behalf, offered the following evidence, viz.:

The Court: Call the witness.

Mr. Horton: DEFENDANT'S EXHIBIT 1, statement of Harkless, has been marked and it's been identified by

the witness Harkless, and he has admitted it is his statement and bears his signature.

The Court: Any objection?

Mr. Eagleton: No.

The Court: It may be admitted without objection.

E. H. THORNBERRY, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. Will you state your name and address?

A. E. H. Thornberry, 200 North Institute, Peoria, Illinois.

Q. What position do you hold with the Peoria and Pekin Union Railway Company?

A. Chief engineer.

Q. And how long have you been the chief engineer?

A. Since 1929.

Q. What is the general location of the Peoria and Pekin Union Railway Company?

A. The Peoria and Pekin Union Railway Company is a railroad which extends in a general north and south 170 direction, has a line of track on each side of the Illinois River, the line on the east side extending from Pekin to Peoria, the line on the west side extending from Hollis to Peoria.

Q. What is the general character of the business of this railroad?

A. Switching and terminal company.

Q. Is a large proportion of its trackage yards and yard tracks?

A. About three-fourths of the trackage is yard and industrial track.

Q. Will you please describe the yards which this railroad owns and operates in East Peoria?

A. The yards in East Peoria extend southerly from about Washington Street in East Peoria to what is known as Wesley. They are about six thousand feet in length, divided into two yards, one known as the "A" yard and one as the "B" yard, the "B" yard being on the north end. Both yards have forty-two tracks.

Q. What separates A yard from B yard?

A. What is known as ladder tracks.

Q. Do each of the forty-two tracks connect with these ladder tracks?

A. They connect with some ladder, yes.

Q. Are there lead or ladder tracks at the north end of B yard?

A. There are.

Q. And do the forty-two tracks connect with these tracks?

A. They do.

Q. They connect with switches, do they?

A. Yes, sir.

Q. And where do these lead tracks extend that go out from the north end of B yard?

A. The lead tracks, one of the lead tracks at the
171 north end of the B yard runs into what is known as the East Peoria industry lead, which is a track on the westerly side of the yard, and extends on around across Washington Street to the various industries, Caterpillar Tractor Co., Herschel Manufacturing Co. and several other large industries. The other lead connects with what is known—or what is commonly called—as the Nickel Plate lead, which extends also across Washington Street and connects with the T. P. & W. and the Nickel Plate main tracks.

Q. Do any other railroads use the rails of the Peoria and Pekin Union Railway Company under tenancy agreements?

A. Yes, sir.

Q. What are those roads?

A. The C. & I. M., the Illinois Central, the Peoria and Eastern, the Nickel Plate, Pennsylvania, the Chicago & Alton, the Chicago & Northwestern, and the C. B. & Q. is a tenant in the Union passenger Station.

Q. Do any of those railroads operate over the rails of the Peoria and Pekin Union Railway Company and bring their trains into the East Peora yards?

A. They all do with the exception of the Burlington, C. B. & Q.

Q. In other words, the freight trains are run right into the East Peoria yards, are they, by these tenants?

A. Yes, sir.

Q. And then the engine is uncoupled, and where do the engines go from those tracks?

A. The engines are uncoupled and come back over the

river to the west side of the river, and are taken care of in our roundhouse at Bridge Junction.

Q. What service is performed by the Peoria and
172 Pekin Union with reference to these trains that are brought into the East Peoria yards?

A. The Peoria and Pekin Union Railway Company make up and break up all of the trains for these various tenant lines, and switch these cars from one road to another, and deliver them to the industries.

Q. What service, if any, does the Peoria and Pekin Union render in the way of making up trains for these tenants?

A. They make up the trains for all of the tenants.

Q. Is there any particular yard that's used for breaking up trains and making up trains?

A. The East Peoria yards.

Q. And state whether or not this operation goes on day and night over there.

A. It does.

Q. And was it going on in the same manner on or about July 12, 1940?

A. It was.

Q. In other words, these foreign lines were constantly bringing their trains in and taking trains out of the East Peoria yards?

A. Yes, sir, that's right.

Q. And switch crews and engines of the Peoria and Pekin Union Railway Company were engaged in breaking up these trains, classifying the cars on different tracks, making up other trains and performing services of that character?

A. That's right.

Q. State whether or not the Peoria and Pekin Union Railway Company also switches to and from the industries in the Peoria and Pekin switching district.

A. It does switch to and from the various indus-
173 tries located on the Peoria and Pekin Union Railway Company's tracks, and also delivers cars to and from other rails which are not tenants of the P. & P. U.

Q. That's called an intermediate switching service, isn't it?

A. Yes.

Q. And it performs an additional service for the tenants in taking care of those engines and rolling stock here in Peoria?

A. Yes, sir.

Q. The defendant is a terminal switching carrier, is that right?

A. That's right.

Q. Mr. Thornberry, in your capacity as chief engineer, have you caused a map to be made of the northern part of the B yard of the East Peoria yards?

A. Yes, sir, we have such a map.

Q. I hand you Defendant's Exhibit 2, and ask you what that is.

A. That is a blueprint of a portion of the Peoria and Pekin Union East Peoria yards.

Q. Was it made from the records and notes in your office?

A. It was.

Q. And under your supervision and direction?

A. Yes, sir.

Q. Does this blueprint map correctly portray the tracks and their positions on or about July 12, 1940?

A. It does.

Q. Does this map show that portion of track B-28 where the injury in this case is supposed to have occurred?

A. It does.

Q. And have you indicated on the map in black ink track B-28?

A. Yes, sir, track B-28 is indicated in black ink.

174 Q. And is this the designation of track B-28 to which you refer (indicating)?

A. Yes, sir.

Q. Running down here, and then I see that it—here is a switch which you have designated "B-28 inside switch."

A. Yes, sir.

Q. Is that the switch that connects track B-28 with what is called 20 lead or 30 lead?

A. That is the switch that connects with what is known as the 30 lead.

Q. Have you indicated on the map the track which is called 30 lead?

A. No, sir, the 30 lead is not indicated. It is shown, but it is not indicated.

Q. Is the 30 lead this track which leads from B-28 inside switch and continues in a northerly direction down through a puzzle switch, and down to what is designated on the map as the industry lead?

A. It connects with the industry lead, yes, sir.

Q. Now, parallel with the 30 lead there seems to be another ladder track and lead and just to the east of it. What is that track?

A. That is called the middle lead or the 20 lead.

Q. The 30 lead connects with most of the tracks in the westerly part of the B yard, doesn't it?

A. It connects with all of the tracks from B-28 to B-42.

Q. And the middle lead, or 20 lead as it's sometimes called, and which is parallel to that track, continues on further, does it?

A. Yes, sir.

Q. And connects with other tracks in the yards?

A. Yes, sir.

175 Q. In B yard?

A. Yes, sir.

Mr. Horton: I offer this map in evidence.

The Court: Any objection?

Mr. Eagleton: No objection.

The Court: It may be admitted.

(Note: DEFENDANT'S EXHIBIT 2.)

Q. State whether or not track B-28 and the yards in general extend in a northerly and southerly direction.

A. In a general north and south direction, yes.

Q. Mr. Thornberry, I will ask you if you made any measurements concerning this accident shortly after it had occurred.

A. I did.

Q. On what day, approximately, did you make these measurements?

A. The same morning that the accident occurred.

Q. Did you make those measurements personally?

A. I had help.

Q. But you were over there on the ground, were you?

A. I was on the ground, yes, sir.

Q. And state whether or not you measured the distance from the switch point of number 28 switch, that divide switch, in a southerly direction along track B-28 to the first evidence of this accident. Did you make such a measurement?

A. Yes, sir.

Q. What was found at that point you measured to?

A. We measured to several different points along the track where there was evidence of it.

Q. Where was the most southerly evidence along that track?

A. I will have to look at my notes. (Does so.) The 176 most southerly point that we measured to was a point three hundred and twenty and seven-tenths feet from the B-28 switch.

Q. What was found at that point?

A. At that point there was a small spring which was lying inside of the river rail.

Q. Was it explained to you that that was the location where there was some blood, or other evidence was?

A. No, the blood was a little bit north of that. The first blood mark on the rail was three hundred and seventeen and six-tenths feet from the switch.

Q. And no evidence of blood or any other evidence of this accident was found at any point further in on the track than that?

A. Nothing further south, no, sir.

Q. That was how many feet, again?

A. Three hundred and seventeen and six-tenths feet.

Mr. Horton: You may cross-examine.

Mr. Eagleton: No questions.

177 SIDNEY J. KEELER, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. What is your name and address?

A. Sidney J. Keller, 423 Peoria Avenue, Peoria, Illinois.

Q. What position do you have with the defendant in this case?

A. Assistant superintendent.

Q. And what was your position on or about July 12, 1940?

A. Chief clerk to the superintendent.

Q. How long had you been chief clerk before that?

A. About twenty-seven years.

Q. The switching operations of this railroad are carried on under the direction of the superintendent's office, are they not?

A. They are.

Q. That is the operating end of the railroad, is it?
A. Transportation, yes, sir.
Q. And as chief clerk and as assistant superintendent, please state whether you have assisted the superintendent in carrying on the details of that work.
A. I have.
Q. Are you in charge of all the books and records that are made in connection with the operation of this railroad?
A. Well, I have direct supervision over the making of the books and records.
Q. State whether or not you are familiar with the property and the tracks and yards of this defendant.
178 A. I am.
Q. You have been over them for sometime, have you?
A. Yes, quite generally.
Q. You have acted in the capacity of a switchman yourself, have you, in the past?
A. I have.
Q. You are familiar with the East Peoria yards, then, are you?
A. Yes, sir.
Q. And know that they run north and south and have forty-two tracks in width?
A. Yes, sir.
Q. And the tracks are connected with various ladder tracks?
A. Yes, sir.
Q. And that tenant lines bring their freight trains in there for engines of the P. & P. U. to break those trains up and classify those cars?
A. And also the outside connections bring trains into the yards where they are broken out and classified for outgoing trains and industries.
Q. And the P. & P. U. also makes up trains for its tenants over there, doesn't it?
A. Yes, sir.
Q. Was that true on July 12, 1940?
A. It was.
Q. And at that time were various tenants running their trains in there, and were the P. & P. U. operating switch engines over there?
A. Yes, sir.
Q. That went on day and night, did it?

179 A. Yes, sir.

Q. And were there always a number of engines operating in those yards?

A. Yes, always.

Q. Was that true on the night of July 12, 1940?

Mr. Eagleton: I object unless he knows of his own knowledge.

The Court: Unless he knows.

A. According to the records, there were trains taken out and delivered during that night.

Q. What's the general character of switching that's carried on in the B yard, or north end of the East Peoria yard?

A. Well, the general work there is the breaking up of trains, although there are some cuts classified for connections, and cars are classified for movement to repair tracks, various railroads and industries.

Q. Are you familiar with the track called track B-28?

A. I am.

Q. And is that in B yard?

A. It is.

Q. Is it a classification track?

A. Well, at the time of this accident it was used as a classification track for bad order cars, cars that arrive in inbound cars that are in bad order for movement to the repair track.

Q. And would the cars of that character be classified by various crews and put on that track?

A. They would.

Q. That would go on all day long, would it?

A. Yes, all day.

Q. And all evening?

180 A. Yes, sir, during the night.

Q. Now, assigned to B yard, to switch in B yard, was there not a job or crew called the East Peoria industry job or crew?

A. Yes, there was.

Q. What were the general functions of that crew?

A. Well, they first delivered a cut, generally delivered a cut to the T. P. & W., then upon their return they did some switching, classifying cars and getting bad orders out of the tracks to place to this B-28, and lined up a cut for East Peoria industries, that is, "Caterpillar" and Altorfer's, Herschel's, Cohen's, and then generally they

moved this track B-28 to the repair track and spotted the cars to the different tracks for repairs.

Q. And was that a nightly occurrence?

A. Every night.

Q. It was a routine matter, was it?

A. Routine.

Q. Done by that crew every night?

A. I wouldn't say by that crew, but as a general thing it was done by the same crew.

Q. That was true long and before July 12, 1940?

A. Yes, for sometime prior.

Q. What do you have to do, Mr. Keeler, with reference to the instruction of operating employees, including switchmen,—

A. Well, I—

Q. —as to the transportation rules of the company?

A. I didn't hear part of your question.

(Two preceding questions read by reporter.)

A. Many of them, whenever I find the time, they are instructed by me in the performance of their duties 181 and the interpretation of the rules.

Q. And are those rules promulgated from the office of the superintendent?

A. They were. I personally arranged the rules in the book, and checked the proofs, and made the book, or made the records from which the book was printed.

Q. I show you Plaintiff's Exhibit A, and ask you what that is.

A. That's the Peoria and Pekin Union Railway Company's transportation rules, effective January 1, 1929.

A. Are they still in effect?

A. They are.

Q. Were they in effect on the night of July 12, 1940?

A. They were.

Mr. Horton: I would like at this time to introduce the following contents of this book, Your Honor, and read it to the jury.

The Court: I see. Go ahead.

Mr. Horton: "General Notice.

"Safety is of the first importance in the discharge of duty.

"Obedience to the rules is essential to safety.

"To enter or remain in the service is an assurance of willingness to obey the rules.

"The service demands the faithful, intelligent and courteous discharge of duty."

Then I would like to introduce the following:

"General Rules.

"Employes must exercise care to avoid injury to themselves or others by observing the condition of equip-
182 ment and the tools which they use in performing their duties and when found defective will, if practicable, put them in safe condition, reporting defects to the proper authorities.

"They must expect trains to run at any time, on any track, in either direction.

"They must not stand on the track in front of an approaching engine or car for the purpose of boarding the same."

I offer those portions of the book in evidence.

The Court: Any objection?

Mr. Eagleton: I object as having no application to this case. He didn't announce the number of the rules.

Mr. Horton: I stated the first I read were in the General Notice, and the following, General Rules, rule M.

The Court: The objection is overruled. They may be admitted.

Mr. Horton: I now offer in evidence rule 32, in the transportation rules of the company, reading as follows:

"The unnecessary use of either the whistle or the bell is prohibited."

The Court: Any objection?

Mr. Eagleton: No objection.

The Court: It may be admitted.

Mr. Horton: I also offer in evidence rule 702 in the book, which reads as follows:—

Mr. Eagleton: I object as wholly immaterial to any
183 issue in this case.

The Court: The objection will be overruled. I think it may be admitted.

Mr. Horton: Rule 702 which has just been admitted in evidence is as follows:

"All employes will be expected to use the utmost care in coupling or uncoupling cars or engines to guard against personal injury and destruction of property and are positively forbidden to go between the cars while in motion to adjust coupler or knuckle or for any other purpose.

"It is alike dangerous to assume that signals given to the Engineman or Fireman have been seen, and if seen,

will be obeyed—when obedience to those signals on the part of Engineman and Fireman is essential to the safety of an employee in the performance of his duty. He must know that the signal has been seen, understood and obeyed, before placing himself in a dangerous position; otherwise, without such knowledge, he assumes all risks of danger arising from any misunderstanding or disregard of signals."

Mr. Eagleton: The further objection that that provision is contrary to the law in this case.

The Court: I think we can take care of that by instruction.

Q. Do you yourself instruct operating employees of the defendant in the meaning and interpretation of these rules?

A. I do.

Q. Do you instruct the operating employees of this 184 company as to the meaning of rules 30 and 32?

A. I do.

Q. What are the men told in general as to the meaning of rules 30 and 32 in your instructions to them?

Mr. Eagleton: I object as immaterial and incompetent to prove any issue in the case, and for the further reason that the rules speak for themselves.

The Court: Do you intend following this, proving the custom or what the men are told?

Mr. Horton: I intend to offer proof that the men are so instructed, and that it is carried out in such and such a way.

The Court: You may proceed with that understanding.

A. Rules 30 and 32 are both read to the men, and they are instructed that, in connection with rule 30, rule 32 means that where it states the unnecessary use of the whistle or bell is prohibited that they must not ring the bell unnecessarily, for the reason that in yards such as we have many engines are operating in the immediate vicinity, and if the bell were continuously rung every time any engine stopped or started it would lose its virtue as a means of warning to anyone who might be on or about the tracks.

Mr. Eagleton: Do I understand, Mr. Keeler, that is what you tell the men yourself?

A. That is what I tell the men.

Q. And what are the men who operate switch engines in the East Peoria yard told with reference to whether or

not they ring bells when moving cars in that—when moving engines in that yard?

A. They are cautioned—

Mr. Eagleton: I make the same objection to the 185 question, the rule speaks for itself and is not subject to interpretation.

The Court: The objection is overruled, and he may answer.

A. They are cautioned be careful of the movements of their own engine and crew, and that they must not stand on or close to tracks where cars are being switched to and from the various tracks in the yards.

Q. Are the engineers and switchmen all instructed as to the meaning of these rules?

A. All of the men I examine and instruct are.

Q. And I don't believe you have answered my question yet. I would like to know what you tell these men rules 30 and 32 mean with reference to the ringing of bells in East Peoria.

A. Well, it means that with their—If they are coupling up a track, as was done in this case, it is necessary that the—it is not neecssary that the bell be rung, for the reason that each crew is supposed to watch the movements of his own engine, and that if all of the engines about the yard rang the bell every time they stopped and started the bell would lose any virtue it had as a warning to anyone who might be on or about the tracks.

Q. What do you tell the engineers and switchmen these two rules require as to starting up engines with cars coupled to them, such as the movement of this engine and cars on the night of this accident?

A. It is not necessary to ring the bell when you start on a track unless there should be some car men, section men or someone such as that about the track, as all members 186 of the switching crew are expected to know what moves are being made, and to provide for their own safety.

Q. Are the switchmen told that the bell will not be rung to warn switchmen who are working on the crew of that particular engine?

A. Those instructions are it is not necessary to ring the bell under those conditions.

Q. Isn't it a fact that the men are told that engineers operating the switch engines in East Peoria will not ring the bell unless they know somebody is in danger?

A. They are told and instructed to that effect.

Q. But, ordinarily, unless the engineer knows somebody is in a position of danger, the bell will not be rung?

A. No.

Q. Is that what the men are instructed?

A. That is the instruction.

Q. Are they instructed that rules 30 and 32 are considered and read together?

A. They are read together

Mr. Eagleton: I object to the leading form of the examination. He can tell what he tells these men without counsel's putting the words in his mouth.

Mr. Horton: You were guilty of that throughout your case, Mr. Eagleton.

The Court: It was leading, but he has answered.

Q. When a new applicant for a job as switchman comes to your office, are they required to pass an examination in these rules?

A. They are.

Q. And do you frequently give those examinations yourself?

A. I do.

187 Q. And then are they examined on the rules after that—

A. They are.

Q. —from time to time?

A. They are.

Q. Do you recall when Harold C. Tennant applied for employment—

A. I do.

Q. —with the defendant?

A. I do.

Q. I believe the plaintiff has admitted the fact, after defendant made a request for an admission of facts, that Harold C. Tennant was first employed as a switchman by defendant on August 1, 1936. Is that in accord with your recollection?

A. That is the date he started to work. He filled out an application a day or two prior to that.

Q. When he filled out the application, what did you do with reference to these rules?

A. I called him in for examination.

Q. Did you first give him a copy of the rules?

A. Yes, he was furnished a copy of the rules.

Q. When he made his application?

A. Yes.

Q. Did you tell him to study them?

A. He was told to study them.

Q. Did you ask him to come back and pass an examination on the rules?

A. At the time I questioned him in the first instance, there was several rules, seemingly he didn't have a proper understanding of the rules, and I asked him if he had ever passed an examination on the rules. He claimed serv-
188 ice with the C. B. & Q. at Creston, Iowa. He said he had been examined, and I said, "Who examined you?" and he said, "The trainmaster", and I told him he would have to study up a little more and come back later.

Q. Do you know what work he did at Creston, Iowa?

A. He worked in several departments. Subsequent investigation showed he had done some switching.

Q. That is a load haul proposition rather than yard switching?

A. He was shown on their records as having switched, I think, about nine months.

Q. Now, when you examined Tennant on these rules, did you examine him with reference to rules 30 and 32?

A. I examined him with reference to all the rules.

Q. When you examined him with reference to these rules, did you tell him how they were to be carried out?

A. I did.

Q. What did you tell Harold C. Tennant with reference to rules 30 and 32?

A. I told him those rules were to be read together, and that our instructions were it was not necessary for an engineer or fireman to ring a bell every time an engine started and stopped, but were required to ring the bell when passing over road crossings or along repair tracks, or where men were working and the bell was used as a warning.

Q. Getting back to the East Peoria yards again: Are there any public road crossings across the yard?

A. Not across B yard.

Q. There aren't any across A yard, either, are there?

A. No.

Q. No crossings between Washington Street in
189 East Peoria and the Wesley crossing about two miles south, is there?

A. No.

Q. So there is no reason to ring a bell in the yards on account of crossing any highway, is there?

A. No.

Q. After you instructed Tennant as to the rules, what did you do with him after that?

A. He was marked up for duty then.

Q. Did he go out as a student?

A. No, he made no student trips. He claimed to have been an experienced switchman, and we didn't require experienced switchmen to make student trips.

Q. Do you recall whether he was examined again as to these rules?

A. Yes, he was examined again in November, 1939.

Q. And at that time did you discuss rules 30 and 32 with him?

A. I did.

Q. Was he able to explain to you what those rules meant?

A. He seemed to have the proper understanding of those rules.

Q. What did he tell you he understood the rules to be?

A. I explained it, and he acknowledged the understanding.

Q. How did you explain it to him on this second occasion?

A. The same as in the first, that the engineer wasn't required to ring the bell every time the engine stopped and started at East Peoria, but that rule 30 was only to passing over highway crossings or repair tracks or where section men were working or others where it was sounded as a warning.

Q. Was it explained to him in yard switching in the East Peoria yards that engine bells would not be rung for the purpose of warning members of the crew unless the 190 engineer knew the crew members were in danger?

A. It was.

Q. When you discussed rules 30 and 32 with Tennant, did he acknowledge he understood them?

A. He had the proper understanding, or else I would not have permitted him to go to work.

Q. Have you looked up the various assignments of Harold C. Tennant during the three years prior to his death when he was working for this company?

A. I have.

Q. About what proportion of that work that he did was in the East Peoria yards?

A. Approximately seventy-five per cent. The entire month of June and the month of July up until the time of his death was entirely in the East Peoria yards.

Q. Now, have you made a record of Tennant's assignments for, we will say, several months before he died?

A. I have for about three years, three years prior to the time.

Q. Let's just have three or four months prior.

A. You want to know how many days he worked in the East Peoria yard and on other assignments? Is that it?

Q. Yes.

A. The month of July was entirely in the East Peoria yard. The month of June entirely in the East Peoria yard. The month of May entirely in the East Peoria yard. The month of April, nine days in the East Peoria yard, and the balance on other assignments. The month of March, fifteen days in engines assigned to the East Peoria yard, and five days assigned to the Pekin run, which performed 191 two or three hours' service in B yard switching and making up their train.

Q. That is enough. You say in the three years of service prior to his death he served about seventy-five per cent of the time in the East Peoria yards?

A. Yes, he did.

Q. Let's go over your records for about two or three months before the time of his death. Will you tell the jury dates he worked on the East Peoria industry job?

A. The month of March he worked on the East Peoria industry assignment the 7th, 17th, 19th and 24th.

Q. Was Harkless his foreman?

A. No, he worked with Mr. Harkless just one day. The other days was what you call the first trick industry job, which commenced work at 7 A. M.

Q. All right!

A. The month of April he was on the East Peoria industry job the 10th, 11th and 12th under another foreman, the 13th Mr. Harkless. The month of May he was on this industry assignment May 14, 15, 16, 18, 20, 21, 22, 27 and 29 under Foreman Harkless.

Q. Who was the engineer?

A. And on the same assignment the 23rd and 25th under Foreman Harkless.

Q. Who was the engineer when he was working with Harkless?

A. Engineer England.

Q. All the way through?

A. This month. I can give them to your previously.

Q. How about the next month?

A. The month of June, 1940, he was on the East Peoria industry assignment, Foreman Harkless, the 1st, 5th, 6th, 8th, all under Foreman Harkless. The month of July 192 he was on this particular assignment the 9th, 10th and 11th under Foreman Harkless. The date is the date he commenced duty. That is 11 P. M.

Q. Who was the engineer during those days?

A. Engineer England.

(Discussion off the record.)

EDWARD HOTCHKISS, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. What is your name and address?

A. Edward Hotchkiss.

Mr. Eagleton: If you have any pictures, I am perfectly willing to admit any pictures taken by the gentleman are properly taken.

Q. What is your name and address?

A. 106 High Street, East High.

Q. Are you a professional photographer?

A. What is it?

Q. Are you a professional photographer in Peoria?

A. Yes, sir. I have been for twenty years.

Mr. Eagleton: I have no objection to the introduction of the pictures as they are.

The Court: Anything further you want to show with this witness?

Mr. Horton: I wanted to show only what date he 193 took the pictures on.

The Court: You may do so.

Mr. Eagleton: You may show in the record by your statement that the man was qualified to take them, and they are a correct reproduction of the things sought to be shown.

Mr. Horton: I offer in evidence DEFENDANT'S EXHIBITS 3 to 8, both inclusive, being pictures taken by this witness on July 12, 1940.

Q. Is that right?

A. That's right. July 12, 1940.

The Court: Any objection?

Mr. Eagleton: No objection.

The Court: Do you care to cross-examine?

Mr. Eagleton: No, your Honor.

Mr. Horton: Just a minute!

Q. I am showing you Defendant's Exhibit 3. Is that track B-28, and was it taken at the point where a spring was found between the rails?

A. Yes, sir.

Q. Looking in a northerly direction?

A. Yes, sir.

Q. Toward B-28 switch?

A. Yes, sir.

Q. Looking at Defendant's Exhibit 4, state whether or not that's B-28 switch.

A. Yes, sir.

Q. And whether your camera was situated to the west of the switch.

A. Yes, I was just west of it, looking in an easterly direction.

194 Q. I want you to look at Defendant's Exhibit 5, and I will ask you if that is not a view taken along the middle of 20 lead from a point just north of 41 switch?

A. Yes, sir, looking in a southerly direction there.

Q. With the camera located between the rails of that lead track?

A. Of the lead, yes, sir.

Q. I will show you Defendant's Exhibit 6, and I will ask you if that is a view of P. & P. U. Diesel engine 200.

A. Yes, sir.

Q. Showing the north or rear end of said engine?

A. Yes, sir.

Q. And taken from a distance of twenty or twenty-five feet away?

A. About twenty-five feet.

Q. I show you Defendant's Exhibit 7, and I will ask you if that is a close-up view of the rear or north end of Diesel 200?

A. Yes, sir. It is the same Diesel, number 200.

Q. I will show you Defendant's Exhibit 8, and I will ask you if that is another close-up view of the north or rear end of Diesel 200.

A. Yes, sir.

Q. And these pictures correctly portray what they are intended to show, do they?

A. Yes, sir.

Mr. Horton: That's all.

Mr. Eagleton: No objection.

The Court: Any cross-examination?

Mr. Eagleton: No cross-examination.

The Court: He may be excused.

Trial Adjourned at 4:45 o'clock P. M.

195 May 6, 1942.

Trial Resumed at 10 o'clock A. M.

Appearances: Same as before.

SIDNEY J. KEELER, having been previously sworn, resumed the stand and testified further as follows, in answer to

Direct Examination (Continued) by Mr. Horton.

Q. Mr. Keeler, in the years that you have been acting as assistant superintendent and as chief clerk, and have been instructing the operating employees as to the rules of the company, have you had occasion to go over into the East Peoria yards to observe whether the rules were being carried out according to instructions?

A. I have.

Q. Have you gone over there frequently?

A. Quite often.

Q. Did you go over there on or before July 12, 1940?

A. I did.

Q. Tell the jury what you observed in the East Peoria yards with reference to the ringing of bells on locomotives.

A. I noticed that the rules were being carried out in

accordance with the instructions issued, that is, if they were switching on what we call an "inside track" or
196 a straight track, such as coupling up and pulling cuts from the tracks, they didn't ring the bell unless they saw someone on or about the track.

Q. What did you observe with reference to movements such as made from track B-28 in this case on the night in question?

A. There was no bell rung unless there was someone on or about the track that the engineer knew, and in that case he would ring the bell.

Q. Your observations indicated that, unless the engineer knew someone was on the track, he would not ring the bell?

A. That's a fact.

Q. And that prevailed not only during coupling up operations, but after the tracks were coupled up and the train would move onto the lead?

A. Pulling onto the lead they did not ring the bell.

Q. That was in accordance with rules 30 and 32 as considered together, was it?

A. Yes.

Q. And according to your instructions?

A. Yes, sir.

Q. How many engines sometimes operate in the East Peoria yards?

A. Well, there are times that there are as many as eight or ten engines very close together along those leads and on those inside tracks, and there, of course, have been times when there were more.

Q. State whether or not constant ringing of bells over in those yards would tend to confuse you.

A. It would.

Mr. Eagleton: I object, if the court please, as invading the province of the jury, and calls for a
197 conclusion.

The Court: The objection is sustained.

Q. When engines are working closely together like that, and one engine would be ringing its bell, the members of the other crews would hear it, would they not?

A. They should if they are close enough.

Q. And they wouldn't know whether the warning was from their engine or some other engine?

Mr. Eagleton: Jus. a minute! I object as invading the province of the jury.

The Court: Objection sustained.

Q. Are there occasions over there when engines are operating on adjoining tracks quite close together?

A. Yes, parallel tracks, adjoining tracks. Sometimes the engines are very close together.

Q. And did this condition as to the number of engines operating in the yards prevail on or about July 12, 1946?

A. It did.

Q. Have you had occasion to observe whether there was any custom and practice over in those yards that an engineer, after receiving a signal to move his engine, would not move his engine until he knew where every member of the crew was?

A. No, it wasn't necessary.

Q. You have never observed it?

A. I have observed it, but it wouldn't be necessary for the engineer. The men are supposed to know what moves are being made, and to protect themselves. The rules require that they know what signals are given and, if
198 given, they can not assume they will not be obeyed. They must keep themselves in a safe place away from danger.

Mr. Eagleton: I move the answer be stricken as not responsive, first, and invading the province of the jury.

The Court: I think it is not responsive, if I remember the question. It may be stricken.

Q. I will ask you it again: Have you observed any practice in the East Peoria yards to the effect that engineers, on receiving signals to move their engines, do not move the engines until they have investigated to determine the whereabouts of all the members of the crew? Have you or have you not observed any such practice?

A. I have observed that they don't. If they get the signal from the proper member of the crew, they act upon that signal.

Q. And state whether or not it is the practice that engineers, upon getting signals to move engines, do not have to investigate to determine whether all the members of the crew are in a position of safety.

A. That is the practice. It's not necessary for the engineer to investigate.

Q. I want to show you Defendant's Exhibit number 3, and will ask you if that is a view of track B-28 with the camera pointing in a northerly direction.

A. It is.

Mr. Eagleton: These were identified by the photographer, and admitted yesterday. It doesn't seem necessary today—

Q. That shows a spring lying between the rails. 199 Was that spring there when you investigated this accident on the day of July 12?

A. It was.

Q. And is it shown there in the same position in which you first found it?

A. It is.

Q. And Defendant's Exhibit 4 is a view of B-28 divide or middle switch, is it not?

A. Yes, the B-28 inside switch.

Q. And Defendant's Exhibit 6 is a view of the Diesel engine number 200 that was used in this switching operation, is it not?

A. Yes.

Q. And is that a view from the north or rear end of the engine?

A. It is.

Q. I show you Exhibit 5, and ask you if that is a view of the 20 or middle lead looking toward the south?

A. It is.

Q. And is that taken from a point just north of 41 switch?

A. It is, just south of 41 switch. Let's see. (Examines exhibit.) Oh, yes, the camera is located north of 41 switch looking south.

Q. I show you Exhibits 7 and 8, and I will ask you if those are close up pictures of the north or rear end of Diesel 200?

A. They are.

Q. When were those pictures taken?

A. July 12, 1940.

Mr. Horton: Cross-examine!

Cross-Examination by Mr. Eagleton.

Q. Mr. Keeler, when was it that you first started to 200 calling in men to examine them on the rules after the rules were issued in January of 1929?

A. Well, new employees, all employees entering the service after the book of rules was issued in January, 1929, were examined before they were marked up for duty.

Early in 1930, about February and March, there was an instruction class in which all employees subject to the rules were called in and given instruction and examination.

Q. That's by you?

A. That was by the superintendent. I was present—

Q. You were present?

A. —as a general rule, yes.

Q. When did you personally begin to function in connection with the instructions to employees, or explanations that might be made to employees?

A. The rules in 1929?

Q. Yes.

A. Immediately after they were issued.

Q. And ever since that time?

A. Ever since that time.

Q. Do you say, aside from this instruction class (which I assume, from your answer, covered all of the employees, as many as you could get together conveniently in groups, various groups) that thereafter, from January 1, 1929, down to date each new employee was given instructions by you?

A. Yes, and occasionally some of them were ordered in at a later date and reinstructed if I found there was anything that led me to believe they didn't have a full understanding of the rules.

201 Q. When you speak of new employees, that includes not only men who come to you with experience, but men who come to you without experience, does it?

A. Yes.

Q. In other words, in any event, they are now employees?

A. Yes.

Q. Does that also include men that have been away from service and previously worked for you?

A. If they previously worked for us, we didn't always order them back for examination. In fact, they were still employees. If they had left the service and were called back, they were required to be examined, but if they were furloughed they were marked up because they had been examined and qualified on the rules.

Q. If a man worked for you for a period of years and went to work for another road, he would be a new employee?

A. No, when our employees were furloughed they had the privilege of working for other railroads.

Q. When they came back were they instructed or reinstructed?

A. If they were furloughed, they weren't instructed. All new employees were instructed.

Q. How often after January, 1929, down to July 12, 1940, a period of eleven years, how often did you call in your employees for the purpose of reinstructing them or explaining rules?

A. Well, I wouldn't say definitely. I know a number of employees were called for reinstruction in November, 1939.

Q. November, 1939?

A. Yes, sir.

Q. And is that when you recollect that you called Tennant back in?

202 A. I reinstructed him in November.

Q. The two rules that you emphasized were 30 and 32, were they?

A. Well, I not only emphasized those rules, I emphasized all rules pertaining to safety because that is one thing I have tried to impress upon the employees.

Q. Did you go over each and every rule from the beginning of the book to the end, or did you pick out certain ones to—you thought particularly applicable to him, or what did you do?

A. As a general rule, I went right through the book. There are some rules pertaining to train orders. After 1930 we weren't using train orders so, of course, we didn't examine or instruct them on train orders.

Q. But you went over the others?

A. Any of the rules pertaining to safety signals and so forth.

Q. When you came to 30 and 32, you explained to these persons you were calling in in November, 1939, "Here are two rules which I want you to read together"?

A. I read them together. I didn't ask them to read them together.

Q. You read 30 out loud?

A. I read 30, and then I read 32.

Q. Then you explained the two rules should be considered together, did you?

A. They should be considered together, yes.

Q. You weren't authorized by anyone, were you, Mr. Keeler, to change any rules?

A. I didn't change any rules.

Q. You didn't understand that was your mission or purpose? Was it?

A. My purpose was to instruct the men.

Q. In other words, what you were trying to do was
203 to make sure they understood the rules as written, is that right?

A. That's right.

Q. You weren't trying to change, modify or create any new rules?

A. I was trying to give them the company's interpretation of the rules as written in the book.

Q. You were trying to give them the company's interpretation?

A. Yes, sir.

Q. How did you get the company's interpretation other than by the rules themselves?

A. By consulting with the superintendent and, of course, my own interpretation. I was the one that picked out the rules and put them in the book when they were made.

Q. When you picked out the rules, if there were any rules at that time that you thought needed cancellation, modification, change or explanation, there was nothing to prevent you from doing it right at the time the rules were put together?

A. I didn't change any rules without consulting with the superintendent.

Q. So when the rules were finally formulated and put into the book and handed to the men, they represented your best thought as to what you thought was necessary?

A. They were the standard rules as adopted by the Association of American Railroads.

Q. And you wanted those rules in your book?

A. Wanted them in the book.

Q. And if you wanted any part of the rules deleted, that was your privilege at that time, or the privilege of your company?

A. It was.

Q. And the fact you had them in the book was evi-
204 dence of the fact you wanted them there, is that right?

A. We wanted them, yes, sir.

Q. When you were calling these men in thereafter, that was merely to be sure they had an understanding of the rules?

A. It was.

Q. You didn't attempt to change rules?

A. I didn't change.

Q. Now, how soon after 1929, January, 1929, did you call in your first group of men to make the explanation that you made here and say you made to Tennant? When did you first do that after 1929?

A. As soon as the new books were issued. Well, I explained the general interpretation to all employees in service; prior to January 1, 1930, was the superintendent's instruction class. Any new men that entered the service after the first of January, 1929, were examined and instructed by me before they commenced duty.

Q. Now, with reference to the superintendent's class in January, 1930, at which you say you were present, what was said?

A. I beg your pardon! I said they were ordered in January. In February the classes were continued.

Q. What was said by the superintendent to these men, the employees, at that time in that class with reference to rules 30 and 32? Tell me now, as near as you can recollect, what was said by the superintendent at that time with reference to rules 30 and 32.

A. He gave them the same interpretation I have given them before and since.

Q. That was merely to the effect that they should be read and considered together?

205 A. And told the engines did not ring the bells at all times. The only time they were to ring the bell was when they were passing over highway crossings and along repair tracks and places where men were likely to be working that were not members of the crew.

Q. You heard him put that—

A. That was his instruction.

Q. In other words, when he came to rule 30, the rule read then as it does now, "The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grade, and to prevent accident"? With reference to that rule you told them that that part of the rule that was written, that pertained to the approaching and passing of public crossings at grades, that would be enforced?

A. Passing public crossings at grade.

Q. You didn't make any explanation of that?

A. Not of that.

Q. And to prevent accidents, you told them that that was still in force?

A. Yes.

Q. So the very part you changed by this explanation, or sought to change, was that the engine bell—where it says the engine bell must be rung when an engine is about to move?

A. We didn't change that. We gave our interpretation of when the bell must be rung. Rule 30, unnecessary use of the bell is prohibited.

Q. Did you tell the men you wanted them to ring the bell, and must ring, when the engine was about to move, or not to?

A. It was always necessary to ring the bell when the engine was about to move.

206 Q. The other two provisions that don't apply to this case with reference to the public crossings and prevention of accident, you told them were in force?

A. Yes, to prevent accident. That is why they have bells and whistles.

Q. Accidents of all kinds?

A. Yes.

Q. And to warn men around there?

A. If a man doesn't know what moves are being made, to warn them.

Q. You don't know what he knows when you saw him in danger?

A. If you know he is in danger, you would ring your bell.

Q. But the first sentence that reads, "The engine bell must be rung when an engine is about to move—"

Mr. Horton: That isn't the end of the sentence. I object to reading fragments of the sentence.

The Court: It is cross-examination. You may correct it in your redirect.

I think the witness is familiar with the book.

Mr. Eagleton: But I object—

Mr. Horton: I object to the attorney calling that a separate sentence.

The Court: You can correct that.

Q. This separate part of the sentence which reads, "The engine bell must be rung when an engine is about to move", you explained that that was not going to be in force, and

that they could violate that if they wanted to at their discretion?

A. I didn't tell them to violate any rule. I told them the interpretation; the engine bell would not always be rung because at some places there were eight or ten or
207 fifteen engines, and, if they were all ringing the bell, the bell on an engine would be useless.

Q. And that is what you told them?

A. I told them why it wasn't necessary.

Q. Did you call in England, the engineer, after that time to see how he understood the thing? The engineer?

A. I can tell by the records what date I called him. He was instructed after that, I know.

Q. After 1930?

A. Well, in that instruction class in 1930. If he was promoted after that date—I believe I promoted him about 1914 or 1915.

Q. He was promoted in 1914, so he testified in a deposition. Did you call him in at any time between 1930 and the date of this accident for the purpose of examining on the rules?

A. Not that I recollect.

Q. Did you ever at any time yourself or hear anyone explain to England, the engineer, the explanation you have made with reference to rules 30 and 32?

A. I heard the superintendent explain it in the instruction class which was attended by Mr. England.

Q. Other than that one time in this class, did you ever do it individually or have anybody else do it individually?

A. In that one class I did instruct them.

Q. Aside from that class, was England ever called in individually and instructed on the rules?

A. Not to my knowledge. He may have been instructed on a rule if I found he wasn't observing it properly, but I wouldn't say he was instructed on the entire book of rules.

Q. Or with reference to rules 30 and 32 being con-
208 sidered together? Did you ever call England in?

A. I can't say whether he was called in specially.

Q. With reference to Cole, the fireman, did you ever call him in?

A. Yes, I talked to Fireman Cole at the time I promoted him. He was promoted possibly a year or two prior to this accident, and at that time I specifically instructed him about this.

Q. What about?
A. About the observance of rules 30 and 32.
Q. That is R. E. Cole?
A. Yes, sir.
Q. And that is the fireman on the engine the night Tennant was killed?
A. Yes, sir.
Q. And you told him substantially what you have told the jury?
A. Yes.
Q. That the two rules should be read together?
A. Yes.
Q. And you told him all of the rules should be obeyed?
A. I—They understand the rules must be obeyed. One of the first articles in the book in entering the service is willingness to obey the rules.
Q. When you had Cole two years before this accident, did you stress 30 and 32 at that time?
A. We talked about 30 and 32 the same as we did all safety rules.
Q. But you remember those two?
A. I remember those two.
Q. Did you call in Harkless and discuss with him the reading of 30 and 32 together at any time after January, 1930, or February, 1930?
209 A. I couldn't tell without looking up the records as to when he entered the service.
Q. Assuming he was in service for ten or more years previous to this accident of 1940, do you recall in that ten years' period of time calling him in and telling him to read 30 and 32 together?
A. I don't recall.
Q. When you say you called in Cole and called in England, I assumed you were calling in all your engineers and firemen.
A. When I talked to Mr. Cole he was being examined for promotion. In connection with these same rules, I also mentioned particularly rule 702 that states—
Q. You act partly as a claim agent, too?
A. Not as a claim agent.
Q. Do you make investigation of cases?
A. Yes, I make investigation of cases.
Q. And settlements?
A. I make no settlements.

Q. Do you consult with your lawyer, and assist and do the work that is necessary in doing the work necessary in research and investigating?

A. I make the investigation and report to the attorney.

Q. That's Mr. Horton?

A. Mr. Horton.

Mr. Eagleton: That's all.

Mr. Horton: I overlooked a couple of questions I was going to ask on direct.

The Court: He may be recalled.

210 SIDNEY J. KEELER, recalled, and having been previously sworn, resumed the stand and testified further as follows, in answer to

Direct Examination by Mr. Horton.

Q. Mr. Keeler, did you make any investigation of this accident at any time after it occurred?

A. I did.

Q. How soon afterward?

A. I was at East Peoria within an hour after the accident occurred.

Q. And did you go upon track B-28?

A. I did.

Q. And see what you could find?

A. Yes, sir.

Q. What did you find on track B-28 commencing at the furthest point south on that track at which you found anything?

A. I will consult my notes on that because— The first evidence was some blood on the outside of the ball of the west rail of track B-28 about three hundred and fifteen feet north of B-28 switch.

Q. South, wasn't it?

A. South, yes, of B-28 switch where B-30 lead connects with B-28. About a foot and a half north of that mark there was some blood, and eighteen inches north of this rail was found Mr. Tennant's right gloved hand at right angles to the rail, with the thumb and finger pointing downward, the fingers slightly closed.

Q. Was that between the rails?

A. That was inside, that is, between the rails of the

track. His lantern was still burning at an angle of
211 approximately forty-five degrees from the hand, with the handle of the lantern about an inch from the fingers.

Q. Was there any object found near that hand? Any other object beside that?

A. Just beyond the hand there was a spring. I would say it was a galvanized spring, steel spring, about two inches in diameter and possibly ten inches long.

Q. Was that a bright, shiny object?

A. Yes, galvanized, and showed up quite plainly.

Q. Did you make any investigation of the Diesel engine and the cars which were involved in this movement to see if you could find any evidence on them?

A. I carefully first made an inspection of the Diesel engine. Before doing that, I looked at the bottom of Mr. Tennant's shoes to see whether there was any grass or anything that might have caused him to slip, or whether there was any evidence of the leather having slipped along the edge of a footboard. I could find nothing to indicate such a condition had arisen. I inspected the footboards of the engine and the safety appliances, that is, the grab irons and hand holds, and found they were all in good condition, and then, as soon as it became daylight, I inspected the cars which had been pulled from track B-28 at the time, probably at the time the accident occurred. I inspected all of the wheels of the cars very carefully, and on the outside rim of the north wheel on the third car from the engine I found a tiny bit of flesh possibly a quarter of an inch in diameter. There was no marks of any blood or any other indication of any of the twenty cars having passed over the body.

Q. Did you find any evidence of blood on any of the
212 wheels of the Diesel?

A. No evidence of blood on any wheels of the cars or Diesel. That flesh was all we found.

Q. You found nothing on the first or second car?

A. Nothing at all.

Q. It wasn't until you got to the third car from the Diesel you found any evidence of flesh?

A. Yes, and that is all we found, just on that one car.

Q. Did you find any evidence on the footboard or any part of the rear or north end of the Diesel that would indicate slipping or anything of that kind?

A. No, there was no evidence on either of the footboards or any part of the engine o' anyone having slipped.

Q. From the investigation you made of this accident, do you have an opinion as to how it might have occurred?

Mr. Eagleton: I object, if the court please, as being immaterial and speculative, and invading the province of the jury.

The Court: Yes, objection sustained.

Q. From the investigation that you made, would it have been possible for Tennant to have been standing on the rails to the rear of this engine, and been knocked over when it started?

Mr. Eagleton: I object, if the court please, as being immaterial.

The Court: Objection sustained

Q. There is on each end of the Diesel a drawhead with sufficient space for a man to sit down on it?

A. There is, and there is also a pilot beam upon which a man could sit. It's possibly eight to ten inches wide and a flat surface.

213 Q. Is it proper for a man to sit on this pilot beam?

Mr. Eagleton: I object, if the court please; no showing he did.

The Court: He may answer whether it is a proper place to sit.

A. It is not a proper place for a man to sit. They can stand on the footboard, but no seats provided on the engine for them to sit down.

Q. In movements of that kind, do switchmen who have no duties to perform, such as a pin puller, that is, except to line switches, sometimes walk around on the wrong side of the train away from where the signals are being given?

Mr. Eagleton: I object, if the court please.

The Court: Objection sustained.

Q. Have you ever observed whether switchmen do that?

Mr. Eagleton: I object, if the court please.

The Court: Objection sustained.

Q. Please state whether operating employees have been warned not to ride on pilot beams.

Mr. Eagleton: I object to that.

The Court: He may answer that.

A. They are, and they were cautioned about standing or sitting on drawheads. If I see a man doing it, I always call his attention to it, tell him not to do it.

Q. What do you instruct the men with reference to rule 702?

A. Well, I always instruct them that if a signad is given it is notice, even if they give a signal that is no sign it will be noted and obeyed, and that they must know that the engineer has seen and understands that the signal is
214 to be obeyed or is obeyed before they place themselves in or on a dangerous position. I always caution them particularly about that because I know of two or three accidents that have occurred as the result of men stepping between cars while in motion. The rules prohibit it.

Q. If a man gets himself out of sight and can't see the signals being given, and stands in a dangerous position, is that a violation of rule 702?

A. It is.

Mr. Horton: That's all.

Cross-Examination by Mr. Eagleton.

Q. Mr. Keeler, the place where you found the blood was on the west rail of this track B-28?

A. Yes, sir.

Q. That would be on the engineer's side?

A. On the engineer's side.

Q. And the place where you found the particle of flesh was on the third car south of the engine?

A. Third car south of the engine.

Q. On the engineer's side?

A. Yes, sir.

Mr. Eagleton: That's all.

Mr. Horton: That's all.

215 HERMAN WIEDEMAN, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. What is your name and place of residence?

A. Herman Wiedeman, 918 Garden Street.

Q. Peoria?

A. Peoria, Illinois.

Q. You are an engineer employed by the Peoria and Pekin Union Railway Company?

A. Yes, sir.

Q. How long have you been engaged in that service for this defendant?

A. Off and on since 1917.

Q. Are you familiar, Mr. Wiedeman, with the book of rules of the Peoria and Pekin Union Railway Company entitled "Peoria and Pekin Union Railway Company Transportation Rules January 1, 1929"?

A. Yes, sir.

Q. In the course of your experience as a locomotive engineer for the defendant, have you had occasion to operate engines in the East Peoria yards?

A. Yes, sir.

Q. And have you had occasion to observe the practices and customs of switching in those yards?

A. Yes, sir.

Q. And you know not only how to do it but how other engineers switch in those yards, do you?

A. That's right.

216 Q. Have you been instructed with reference to rule 30 and rule 32 of the transportation rules of the defendant?

A. Well, yes, when we was all examined in 1930, I believe it was.

Q. And do you know now the instructions that you received with reference to those two rules?

A. Yes, sir.

Q. Please tell the jury how you were instructed with reference to those rules 30 and 32.

Mr. Eagleton: I am going to object to any instruction given this man as being immaterial to the issues in this case.

The Court: He may answer. Objection overruled.

A. We are always instructed while we are working in the yards that unnecessary noise bothers the men working there, they can't hear, and I work nights most of the time. We never ring the bell unless we see somebody that is in between the cars or crossings. That is the only time we ever ring the bell at night.

Q. State whether or not you were instructed that rules 30 and 32 are to be considered together.

A. Yes, sir.

Q. And state whether or not rules 30 and 32 as instructed and as carried out provided that bells not be rung

on locomotives in the East Peoria yards unless the engineer knew that somebody was in a position of danger.

A. That is our instructions. If we see anybody in danger, we ring the bell.

Q. And if nobody is in danger, you don't ring the bell?

A. Don't ring the bell.

Q. Does that apply during coupling operations
217 when cars are being coupled up on a track?

A. No, sir, because if the man is close he may be hollering at somebody, and we wouldn't hear it.

Q. I say when cars are being coupled up on a track is the bell rung every time cars are pushed together and slack is taken?

A. No, sir.

Q. And then after the cut is all together and coupled together and about to move out, is the engine bell rung then?

A. No, sir.

Q. In other words, it's never rung unless the engineer knows or sees somebody is in a position of danger?

A. That's right.

Q. Do you know anything, Mr. Wiedeman, about a practice in the East Peoria yard which was testified to by Harkless, a witness for the plaintiff, to the effect that after an engineer receives a signal to move his engine he can't move until he has made an investigation to determine where every member of the crew is, and that he is in a safe position?

A. I don't know of any such rule.

Q. What is the practice?

A. The practice is the foreman tells his men what to do, and we don't know anything about that, we don't know where anybody is except we see the man coupling up the cars, it may be one or it may be two. We don't know where the rest of the men are.

Q. And if you get a signal to move your engine from somebody who has a right to give a signal,—

A. Yes, sir.

Q. —you move it?

218 A. We move it. We generally follow the one lamp.

Q. Unless you have actual notice somebody is in danger, is that right?

A. Yes, sir.

Q. And have you observed whether or not that practice

is followed by the other engineers operating in the East Peoria yards?

A. As far as I know, yes, sir. I work there, and we work side by side, and we all do about the same.

Mr. Horton: That's all.

Cross-Examination by Mr. Eaglton.

Q. Mr. Wiedeman, you were working there prior to 1930 as an engineer, were you?

A. Yes, sir.

Q. And that practice that you speak about with reference to ringing a bell and not ringing a bell was the same before 1930 as it was afterwards, was it?

A. Yes.

Q. In other words, this explanation that was made to you by the superintendent in this class did not change anything from what was existing before?

A. No, we used our own judgment in that.

Q. In other words, did the superintendent tell you that's what he expected you to do in connection with these rules, was taken them and use your own judgment?

A. He said, "You will all use your own judgment."

Q. All of you use your own judgment?

A. Sure.

Q. In other words, he gave you a rule book with certain written, specific, definite instructions in it, and the instructions he gave you were, "Use your own judgment"?

A. Elastic.

Q. And that was what you got out of this class meeting in February, 1930, from the superintendent in this instruction class? You, as an engineer, got out of it that "Here's a rule book", that all rules are elastic, and you can use your own judgment any time you want?

A. Well, I wouldn't say any time we want. We observe a majority of the rules.

Q. I am trying to get what he told you. He told you you could observe a majority of the rules?

Mr. Horton: I object to talking about a majority of the rules. We should be confined to the rules admitted in evidence.

The Court: No, he may state. He may answer.

Q. Was that what he told you?

A. What was that?
(Question read by reporter.)
A. No, we were instructed to observe all the rules.
Q. You were?
A. Yes.
Mr. Eagleton: I believe that's all.
Mr. Horton: That's all.

220 A. E. COON, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. State your name and your residence.
A. A. E. Coon, 209 Cedar Avenue, West Peoria.
Q. What is your present capacity with the Peoria and Pekin Union Railway Company?
A. Locomotive engineer.
Q. How long have you been a locomotive engineer for the defendant?
A. For about twenty-eight years. I was off in the army at one time for pretty near a year. I never figured all of that out. I was promoted in 1913, I believe.
Q. And during the course of those years have you operated locomotives all over the property of the defendant?
A. Yes, sir.
Q. And, in particular, have you operated switch engines in the East Peoria yards of the defendant?
A. Yes, sir.
Q. Quite frequently?
A. Yes, sir.
Q. And during those years have you had occasion to observe the practices and customs of switching that are carried out in those yards by switching crews and engineers?
A. Yes, sir.
Q. Are you familiar with the book of rules of the defendant called "Peoria and Pekin Union Railway Company Transportation Rules January 1, 1929"?
221 A. Yes, sir.
Q. And are you familiar with rules 30 and 32 in that book?

A. Yes, sir.
Q. Have you been instructed—
A. Yes, sir.
Q. —as to those two rules?
A. Yes, sir.
Q. Please tell the jury what your instructions are as to those rules.
A. We was instructed to obey the rules, all of our rules, and 30 and 32 together.
Q. And in the carrying on of switching operations in the East Peoria yard what have you been instructed under those rules with reference to the ringing of bells?
A. To ring the bell if it was necessary for the bell to be rung.
Q. And in what cases have you been instructed that it is necessary or unnecessary to ring the bell?
A. Well, if there is anybody in the way, around any of the men, car inspectors, yard clerks or section men, anybody that might be around in the way, you would ring the bell to notify them.
Q. And what are your instructions with reference to the ringing of bells for the purpose of warning members of your crew whom you do not know to be in a position of danger?
A. We don't ring it.
Q. And state whether or not that applies during operations in coupling up cars on tracks over there.
A. Yes, sir.
Q. And state whether or not that applies in moving out cuts of cars—
A. Yes, sir.
Q. —onto the lead.
222 A. Yes, sir.
Q. State whether or not that applies in all switching operations which occur in the East Peoria yards.
A. Yes, sir.
Q. State whether or not you have observed whether those instructions are carried out by other engineers working in that yard.
A. Yes, sir.
Q. In other words, engineers do not ring the bell on locomotives for the protection of members of their own crews unless they happen to know that they are in a position of danger, is that right?

A. Yes, sir.

Q. State whether or not there is any practice in switching in the East Peoria yards which would require an engineer to investigate and determine the whereabouts of all the members of his crew before he can move his engine.

A. No, sir.

Q. What is the practice in that regard?

A. You just go along with your general work. If some of your crew gets off, you work with whoever you got left to work with and do your work.

Q. Those are all experienced men that work with you, aren't they, over there?

A. Yes, sir.

Q. The switching is more or less of a routine matter, isn't it?

A. Yes, sir.

Q. The switchmen know what movement is to be made, and how to take care of themselves?

A. Yes, sir.

223 Mr. Eagleton: I object to that, if the court please.

The Court: Yes, objection sustained.

Mr. Horton: Cross examine!

Cross-Examination by Mr. Eagleton.

Q. Mr. Coon, what was it you got out of this instruction class in 1930 or thereabouts when the superintendent had a class with reference to rules 30 and 32? Did he tell you the rules were elastic, and in applying the rules you should use your own judgment?

A. No, sir.

Q. He did not?

A. No, sir.

Q. He didn't tell you the rules were elastic?

A. No, sir.

Q. He didn't tell you to use your own judgment?

A. No, sir.

Q. He told you you should obey the rules?

A. Yes, sir.

Mr. Eagleton: That's all.

Redirect Examination by Mr. Horton.

Q. Did he tell you that rules 30 and 32 were to be considered together?

A. Yes, sir.

Q. And did he tell you that, to ring the bell every time a locomotive was moved over in the East Peoria yard, would be an unnecessary ringing of the bell?

224 Mr. Eagleton: I object as leading and suggestive.

The Court: Objection sustained as repetition.

Mr. Horton: That's all.

ARTHUR E. PRATT, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to:

Direct Examination by Mr. Horton.

Q. Please state your name and address.

A. Arthur E. Pratt, 815 Butler, Peoria, Illinois.

Q. And in what capacity do you work for the defendant?

A. Locomotive engineer.

Q. How long have you been a locomotive engineer for the Peoria and Pekin Union Railway Company?

A. Thirty years on the Peoria and Pekin Railway.

Q. During that period of time have you operated engines over all the property of this railroad?

A. Yes, sir.

Q. During that time have you operated engines in the East Peoria yards?

A. Yes, sir.

Q. During that time have you had occasion to observe the customs and practices of operating switch engines in the East Peoria yards?

A. Yes, sir.

Q. And you have observed how other engineers operate their engines, have you?

225 A. Yes, sir.

Q. Are you familiar with the transportation rules of the defendant?

A. Yes, sir. I was examined in 1930 on that, in February.

Q. Are you familiar with rules 30 and 32 contained in those rules?

A. Yes, sir. I consider those two rules together. I meant to say those two rules are together.

Q. I believe you said you had been instructed in those rules February, 1930.

A. Yes, sir.

Q. What was the instruction that you received with reference to those rules?

A. To obey them.

Q. Who gave you the instructions?

A. The superintendent and his assistants, because there was a school conducted at that time. There was a school of instruction.

Q. What were you told with reference to— What were you told with reference to those rules about the ringing of bells in switching in the East Peoria yards of this company?

A. We were not to ring them on an inside yard where there is continual switching and coupling up of cars. It causes confusion.

Q. State whether or not from your observation the rules were carried out that way in the East Peoria yards.

A. Yes, sir.

Q. And was that true on or about July 12, 1940?

A. Yes, sir.

Q. State whether that rule was carried out in that manner when cars were being coupled up on a track.

A. Yes, sir.

Q. And was that the way the rule was carried 226 out on or about July 12, 1940, after a cut of cars had been coupled up and was moving out onto the lead?

A. Yes, sir.

Q. It has been testified to by Mr. Harkless in this case that there was a custom and practice in the East Peoria yards that after an engineer got a signal to move his engine he didn't dare move it until he had investigated to find out whether every member of the crew was in a position of safety. Do you know anything about any such practice or custom?

A. No, sir.

Q. Did you ever hear of it?

A. Never heard of it, and I have worked on several railroads besides the P. & P. U.

Q. What is the practice, as to that observation?

A. Do you want me to go on the routine as to what the three members of the crew should do?

Q. No, whether there is any practice that requires the engineer to look around to see where the members of his crew are before he moves.

A. No, sir.

Q. All members of a switching crew have certain definite duties, do they not?

A. Yes, sir.

Q. Every man is supposed to know what those duties are?

A. Yes, sir.

Q. And you engineers assume every man is doing his duty, do you not?

A. Yes, sir.

Q. One of the duties of a man is to keep alert and keep clear of danger, isn't it?

227 A. Yes, sir.

Q. You don't ring a bell unless you actually know that somebody is in between cars or is actually in a position of danger, do you?

A. That's when I ring them and blow the whistle, in addition to the bell.

Q. Unless you know that, you move the engine without ringing the bell?

A. Yes, sir.

Q. That is the general practice over there, according to your observations?

A. Yes, sir.

Q. That was the practice on July 12, 1940?

A. Yes, sir.

Mr. Horton: Cross examine!

Cross-Examination by Mr. Eagleton.

Q. Only one or two questions: As I understand it, in this instruction class of 1930, the superintendent told you these rules, both of them, 30 and 32, were to be obeyed, is that right?

A. Yes.

Q. He told you to read them together if you wanted to?

A. To read them together.

Q. And to consider them together?

A. They are together.

Q. There is a rule in between? 31?

A. Yes.

Q. But he told you to consider them together, did he?

A. They are together.

228 Q. Wait just a minute! I can locate it, I think, in the book. I wasn't there at the class in 1939. Did

the foreman or superintendent in 1930 tell you to consider those two rules together?

A. They are split in the book, but they belong together.

Q. I don't think you understand me. I am asking you if the superintendent in his instructions told you to consider them together.

A. We were instructed on the book of rules all the way from the beginning to the end, and to observe all rules in there.

Q. And no two rules were picked out in particular?

A. Not in this class of instruction, no, sir.

Q. And he didn't tell you any of the rules were elastic?

A. No, sir.

Q. And he didn't tell you some were to be used in your discretion or not as you saw fit?

A. There was about forty when I was there, and I never heard that.

Q. And he never told you to obey the majority and let the minority rules go?

A. No, sir, he never picked out any rules in the school of instruction.

Redirect Examination by Mr. Horton.

Q. In the application of rules 30 and 32, 32 provides that unnecessary ringing of the engine bell is prohibited, doesn't it?

A. Yes, sir.

Q. And whether or not a bell is rung over in the East Peoria yards under that rule becomes discretionary with the engineer, doesn't it?

A. Yes, sir.

229 Q. He has to determine whether he knows that somebody is in a position of danger or not?

A. Yes, sir.

Q. So, to that extent, he has to use his own facilities and his own discretion—

A. Yes, sir.

Q. —to determine whether somebody is in a position of danger, is that right?

A. Yes, sir.

Q. If he knows somebody is in danger, he rings the bell?

A. Yes, and blows the whistle in addition to attract more attention.

Q. Does the mere fact that a pin puller gets out of sight of the engineer, is that any indication to the engineer that that man is in a position of danger? The mere fact that he gets out of your vision?

A. No, sir. He's to protect his own safety in that case.

Q. You assume he is off performing his regular duties?

A. Yes, sir.

Q. And keeping alert for his own safety?

A. Yes, sir. We all have to do that.

Mr. Horton: That's all.

Mr. Eagleton: That's all.

(Recess.)

230 HERMAN WIEDEMAN, recalled, and having been previously sworn, resumed the stand and testified further as follows, in answer to

Direct Examination by Mr. Horton.

Q. Mr. Wiedeman, you have testified as to your observations of the practices of switching that are being carried on in the East Peoria yard, and also as to the instructions as to how the rules were to be carried out. Does that apply to the period on or before July 12, 1940?

A. Yes, sir.

Q. And during the time you were an engineer over in the East Peoria yards and working under these rules and practices, state whether or not Harold C. Tennant ever worked with you as a member of the switching crew.

A. Yes, off and on.

Mr. Horton: That's all.

Mr. Eagleton: That's all.

231 A. E. COON, recalled and having been previously sworn, resumed the stand and testified further as follows, in answer to

Direct Examination by Mr. Horton.

Q. Does all your testimony as to your observations of the practices in switching in the East Peoria yard and the observance of the rules over there apply to the period on or about July 12, 1940?

A. Yes, sir.

Q. State whether or not while you have switched over in those yards as an engineer under these rules and practices, whether Harold C. Tennant was ever a member of your crew.

A. I don't remember ever working with him in the "hump" yards. I worked with him on the west side. I don't remember. I might have worked with him, but I don't remember

Mr. Horton: That's all.

Mr. Eagleton: That's all.

232 ARTHUR E. PRATT, recalled, and having been previously sworn, resumed the stand and testified further as follows, in answer to

Direct Examination by Mr. Horton.

Q. I believe you testified, did you not,—

A. Yes, sir.

Q. —that the practice you observed over there and the rules, the way they were enforced,—

A. Yes, sir.

Q. —applied to the year 1940 and thereabouts? Will you state whether or not Harold C. Tennant ever worked on a crew as a switchman?

A. He did in September, 1939, on the west side in the Northwestern yards. I have no recollection of working with him over in the "hump".

Q. Do these same rules apply to the Northwestern yards?

A. Yes, sir.

Q. Same practices?

A. Yes, sir, same duties as a pin puller.

Mr. Horton: That's all.

233 CHESTER N. STRINGER, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. State your name and residence.

A. Chester N. Stringer, 400 Macqueen, Peoria, Illinois.

Q. What is your present capacity with the defendant?

A. Switchman; engine foreman, P. & P. U. Railway.

Q. How long have you been an engine foreman, Mr. Stringer?

A. I don't recollect the actual years, but it has been a number of them, in excess of twenty-five.

Q. Prior to the time you were foreman, you acted as a switchman, did you not, for the defendant?

A. Foreman, yes, sir.

Q. About how long have you been employed in those two capacities?

A. Approximately twenty-eight years. I don't recollect the actual dates.

Q. Have you duties required you to switch in all portions of the property of the defendant?

A. Yes, sir.

Q. And have they required you to perform switching operations in the East Peoria yard?

A. Yes, sir.

Q. Have you, during that period of time, had occasion to observe the customs and practices of switching—

A. I have.

Q. —in the East Peoria yard? And have you observed the practices with reference to the ringing of bells on 234 locomotives in the East Peoria yard?

A. Yes.

Q. Are you familiar with the transportation rules of the defendant issued January 1, 1929?

A. I am.

Q. Are you familiar with rules 30 and 32 contained in that book of rules?

A. Yes.

Q. Have you ever been instructed with reference to those rules and their meaning and interpretation?

A. I have.

Q. When and by whom were you so instructed?

A. By Mr. Umshler, the superintendent, and a prior superintendent, Mr. Bath.

Q. What was the instruction that you received with reference to those rules?

A. Obedience.

Mr. Eagleton: When?

A. In 1930, I believe, the last time.

Q. Go ahead and answer my question, please.

A. Please repeat it.

The Court: Read the question.

Q. What were the instructions you received with reference to rules 30 and 32?

A. Obedience to the rules as interpreted by the rule book itself and special instructions.

Q. What were you told that those rules meant with reference to the ringing of bells in the East Peoria yards, if anything?

A. Well, we were told to use the bell, or instruct the
235 engineer or the fireman to use the bell, wherever approaching grade crossings or through a district where anybody was working foreign to the members of your own crew, and not to use the bell in excess in districts where it's not necessary.

Q. Have you observed how those rules were carried out and followed in the East Peoria yard?

A. Yes, I have.

Q. State whether or not engineers constantly rang the bell every time they moved an engine.

A. They don't.

Q. When do they ring the bell?

A. The only time that there is a bell ringing or blowing of the whistle is when some member of the crew gets out of places he recognizes, or there is foreign people around in the vicinity of where you are working, such as car repairers or inspectors, yard clerks.

Q. What do you mean by a member of the crew getting out of place?

A. Well, if a member of the crew happens to step in between cars where a signal is given beyond him, the engineer will ring the bell and blow the whistle.

Q. That's in case the engineer knows he went between the cars, isn't it?

A. It is.

Q. If the engineer does not know that a member of the crew is out of place or in a position of danger, what is the practice with reference to his ringing the bell whenever he starts or moves the engine?

A. He doesn't use the bell or whistle.

Q. Have you been instructed that that is the ob-
236 servance? That that is the method of observing rules 30 and 32?

A. Yes.

Q. Have you been instructed that rules 30 and 32 are to be considered together?

A. Yes, we have.

Q. Mr. Stringer, it has been testified to by Harkless, a witness for the plaintiff, that there was a custom and practice in the East Peoria yards that after an engineer received a signal to move his engine he could not move it until he had investigated to determine that all members of the crew were in a position of safety. Do you know anything about such a rule or practice?

A. I never heard of such a rule or instruction.

Q. What is the actual practice as to an engineer moving an engine when he doesn't know where all the members of the crew are?

A. An engineer does not see all members of his crew at all times when working in the leads or in the yards in East Peoria. There's quite a number of times that a man will be on top of a car. The man that is close to him is taking care of him. Another member will be out performing his duties some place else, lining switches for the current movement of his train.

Q. The mere fact that an engineer does not see all the members of his crew after he gets a signal to move does not signify that anybody is in a position of danger, does it?

A. No.

Q. And, according to your observation as to how switching practices are carried on, if an engineer receives a signal to move an engine, and he does not know where all the members of the crew are, does he move the engine?

A. He does.

237 Q. Unless he has positive knowledge that some member of the crew is in a position of danger, isn't that it?

A. That's right.

Q. And do these practices and the carrying out of the rules as you have described them apply to the period on or about July 12, 1940?

A. It did.

Q. Mr. Stringer, have you ever been the foreman of the job called the "East Peoria industry job"?

A. I have.

Q. And you are familiar with the duties and assignments of that job, are you?

A. Yes.

Q. Did Switchman Tennant act as a member of your crew while you were carrying on the East Peoria industry job?

A. He has.

Q. State whether or not the taking of the cars out of track B-28 was one of the routine movements to be performed in that job.

A. Once in a while it was, as instructed by the yardmaster. It has been done while I was in charge.

Q. That is at the time you were in charge?

A. At the time I was in charge once or possibly twice, to my knowledge.

Q. Well, you were on a different shift, weren't you?

A. Second shift.

Q. The one on which Tennant was working when he was killed was the third shift?

A. Third shift, I believe.

Q. That started at 11?

238 A. I work from 3.

Q. When you had the East Peoria industry job, it started at what time?

A. 3 to 11.

Q. And that job did not always pull out the cars on track B-28?

A. No.

Q. Didn't you have other switching jobs which were similar to that?

A. We did.

Q. Did Tennant act as pin puller when he was on your crew?

A. I can't say. I don't recollect, because he was on there just for a short period of time as an extra man.

Q. In moving into a track to get cars such as was performed on the night of July 12, 1940, on track B-28, what were the usual and customary duties of the pin puller?

A. Well, the usual duties is the pin puller, when moving against a cut, he couples the engine on, the foreman and field man proceeds on down and couples up the cut. The pin puller usually stays with the engine or with—if there is any movement of trains in the district he will go out and protect the engine and the lead.

Q. What do you mean by "protecting the lead"?

A. By lining switches for the current movement or protecting other crews from putting cars or pulling an engine on the track they're on.

Q. If he stays with the engine, what are his duties?

A. If he stays with the engine, he is usually in a position then to double signals.

Q. He should stand where he could see the signal being given?

A. Yes, and double them in places,—

Q. If necessary?

239 A. —if necessary.

Q. Is it necessary for the pin puller to double or relay any signals on the straight tracks—

A. No.

Q. —of those yards over there? Was B-28 straight track?

A. B-28 is a straight track.

Q. On a straight track of that nature, it is customary for the foreman or field man to get the signal down to the engineer?

A. Down to the engineer.

Q. It is not necessary for the pin puller to relay the signal?

A. No.

Q. But if he stays near the engine he should be in a position where he can see the signal being passed, is that right?

A. Yes.

Q. What duty does he have with reference to looking after his own safety?

A. Well, it's always understood that a man, after coupling an engine on, he is protecting himself. The balance of the crew go on and couple up their track, and they understand that that man is in a safe position.

Q. You say while those practices were being carried on Tennant worked with you as a member of your crew?

A. Yes.

Q. So far as you know, he fully understood those duties?

A. He did.

Mr. Horton: That's all.

240 *Cross-Examination by Mr. Eagleton.*

Q. Mr. Stringer, as a foreman you are faced with the duty of giving instructions to your men as to the duties they are to perform?

A. Yes.

Q. And it is their duty, under the rules of the company, to obey your instructions?

A. Yes.

Q. Irrespective of how some other foreman may perform the other task? That's right, isn't it?

A. That's right.

Q. In other words, he owes his obligation and duty as to instructions to the particular foreman under whom he is working at the time? That's right, isn't it?

A. That's right.

Q. The foremen being different human beings have different ideas as to the character of the movements that will be made, and how they will be made, isn't that right?

A. Yes.

Q. They don't all do it alike?

A. Not all.

Q. Sometimes one man will make four or five movements in coupling cars together, and drop cars here and there, and go in various tracks in order to assemble cars, whereas another man maybe with more experience, more efficiency, may make it in less movements, isn't that right?

A. That's right.

Q. I believe you said the man who is the head man (which is another way of speaking of the pin puller), he is referred to as the "head man", as the "head switchman", isn't that right?

241 A. That's right.

Q. As a rule, he's near the head end?

A. That depends on which way you move.

Q. He is with the engine end?

A. He stays with the engine.

Q. He stays with the engine or a car length or two away so he is close enough to relay signals?

A. Not on a straight track.

Q. When he is on a straight track like 28, it's straight until it turns, isn't it?

A. Straight all the way through.

Q. After he goes out of B-28 and goes out to the Nickel Plate after the train is coupled up, he goes around a curve?

A. He does.

Q. You say sometimes during that work you will have a man ride the engine out and other times he will walk ahead?

A. Yes.

Q. Sometimes your man will ride the footboard around the curve so if the field man below notices something going

wrong or the brake is dragging or a brake is tightened too much and is squealing and is binding, damaging possibly the brake or brake shoe, anything he may notice down at that end eight hundred feet away when you have got twenty cars, he will want to signal up to the front end, won't he?

A. Yes.

Q. And that signal that comes from the field man or foreman may come at a time when they are going around a curve?

A. That's right.

Q. No one knows exactly in switch movements what
242 is going to happen each and every minute before it happens, do you?

A. No.

Q. You use your best judgment, don't you?

A. That's right.

Q. For that reason, when you are instructing a head man you instruct him either to stay close to the engine or walk on ahead, either one he cares to do, is that right?

A. That's right, but you don't always issue the instructions on each and every move.

Q. If a man is experienced, you don't have to express or give specific instructions on every move, do you?

A. No.

Q. As a matter of fact, Mr. Stringer, you don't work by night? You don't work by word of mouth?

A. Very rarely.

Q. You work by signals?

A. That's right.

Q. The only means of communication between the foreman and field man at the end of the cut of cars and the man at the head of the train is by signals, isn't that right?

A. Yes.

Q. No word of mouth about it?

A. No, not if you are close up together.

Q. If you come up close, you will say to a field man, "We will go in 41 and drop two, and push in on 30 and get six", and general information like that?

A. General information.

Q. But, so far as movements of your train,—that is by signals?

A. By signal and prior instructions; knowledge.

243 Q. This class, did you happen to attend that same class these men attended in 1930?

A. Yes, sir.

Q. You have not been examined since?
A. Not examined, but I have been instructed.
Q. Not called in for any specific discussion of the rules since 1930?
A. No.
Q. In this 1930 class, was that class conducted by the superintendent, Mr. Umshler?
A. Yes.
Q. Do you recall whether he said at that time that 30 and 32 were to be read together?
A. I don't actually recall it.
Q. You don't recall that? Do you recall him mentioning 30 and 32, or emphasizing those two rules in particular?
A. Not to my direction.
Q. Well, to the class?
A. To the class.
Q. You think he did?
A. I think he did.
Q. Your recollection is now, going back ten years ago, that at that class meeting Mr. Umsher said something about reading 30 and 32 together?
A. 30, 31 and 32.
Q. 30, 31 and 32? He said the three of them?
A. Yes.
Q. That is your recollection?
244 A. As I recollect it. I didn't pay any particular attention to the whole group because the questions were not carried out in rotation. A rule was picked here, a rule was picked here.
Q. What you got out of its after you had listened attentively and paid attention to the proceedings, you were to obey the rules as written in the book, isn't that right?
A. That's right.
Mr. Eagleton: That's all.
The Court: Is that all?
Mr. Horton: That's all.

ROSCOE A. HANCOCK, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. What is your name?
A. Roscoe A. Hancock.
Q. Where do you live?
A. 1503 Missouri.
Q. What capacity do you have with the defendant in this case?
A. I am employed as engine foreman.
Q. How long have you been an engine foreman?
A. Since June 15, 1920.
Q. And did you serve as a switchman before that?
A. For about three weeks before that.
Q. Have your duties as an engine foreman required 245 you to engage in switching operations on the various tracks of the defendant?
A. Yes, sir.
Q. And in the East Peoria yards?
A. Biggest majority of the time.
Q. And during the space of time that you have been a foreman, have you had occasion to observe the practices and customs of switching—
A. I have.
Q. —in the East Peoria yard?
A. I have, sir.
Q. Are you familiar with the transportation rules of the defendant?
A. I am.
Q. Are you familiar with rules 30 and 32 contained in this book?
A. I am.
Q. Have you been instructed as to the meaning and interpretation of the rules?
A. I attended the class of instruction they had at the time. I don't remember the exate date, but all the employees were called up for a class of instructions, and the book of rules was gone over from one end to the other.
Q. What were the instructions you received with reference to rules 30 and 32?

A. When an engine was to start, the bell was to be rung, or when anyone was in danger, or to attract attention of people that might be walking along the track, yard clerks, section men or trespassers who might be walking through the yards, or anyone who placed himself in a dangerous position.

Q. Were you instructed, under rules 30 and 32, the
246 engine bell must always be rung every time an engine was to move?

A. Not always, only when necessary.

Q. Were you instructed as to when the engine bell would be rung when an engine was about to move?

A. My understanding was when the engine started to move at the beginning of the shift, that an engine, after it starts to work in the special yards, is in continuous operation for eight hours with the exception of the twenty minutes we are out for lunch, it is in continuous operation, and it is not necessary to ring the bell at all times.

Q. Will you state whether or not you were instructed that rules 30 and 32 were to be considered together?

A. I was instructed they were to be considered together, and the bell was not to be wrung unless it was necessary, because a continuous ringing of the bell would be confusing.

Q. What were you instructed with reference to the times that it was necessary to ring a bell?

Mr. Eagleton: I am going to object to that question because it assumes he was given any instructions in that respect.

The Court: If he was, he may answer.

A. What is the question?

(Question read by reporter.)

A. As a warning signal.

Q. And under what circumstances?

A. Well, a person who might place himself in a dangerous position, or section men working on the track, or to attract attention to anybody that wasn't with the crew, that a move was about to be made.

247 Q. Was the bell to be rung for the purpose of warning members of the crew?

A. No, sir.

Q. They were presumed to know all about the job and the movement, and that they would keep themselves in a position of safety, is that right?

Mr. Eagleton: I object; leading and suggestive.

The Court: Yes; objection sustained.

Q. At any rate, the instructions were that the bells were not to be rung for the purpose of warning members of the crew, is that right?

A. That's the understanding.

Mr. Eagleton: I object, if the court please.

The Court: Objection sustained. He has answered.

Q. It has been testified to in this case by Mr. Harkless, for the plaintiff, that there was a general practice of switching in the East Peoria yards that an engineer could not move his engine until he had investigated and determined that every member of the crew was in a position of safety. Do you know anything about such a practice?

A. That is not the practice.

Q. What is the practice?

A. When the engineer receives the signal from the foreman or whoever is in a position to give the signal, he obeys that signal.

Q. Does he obey it, even though he does not know where all the members of the crew are?

A. He does.

Q. Is it any indication anybody is in danger simply because they are out of sight?

248 A. No, sir.

Q. Have you had occasion to observe how rules 30 and 32 were being carried out in the East Peoria yards?

A. I have.

Q. What did you observe?

A. I observed that the engines working on a straight lead never ring the bell, with the exception of times someone may be in a dangerous position or working on the tracks in front of the engine when it is about to move.

Q. When you speak of somebody that might be in a position of danger, do you mean someone the engineer knows to be in a position of danger?

A. Yes, such as car inspectors or yard clerks or section men.

Q. But it does not apply to members of the crew?

A. No, sir.

Q. And were those the customs and practices of switching on or about July 12, 1940?

A. Those have been the practices ever since I have been there.

Q. And while those practices were being carried out and the rules were being complied with as you have testified, did Harold C. Tennant ever work with you as a member of your crew?

A. He worked with me numerous times.

Q. In what capacities?

A. Most generally following the engine; pin puller.

Q. And while he was working with you did he have an opportunity to observe the rules and practices, the way they were being carried out?

A. He did.

Mr. Horton: That's all.

249 *Cross-Examination by Mr. Eagleton.*

Q. Mr. Hancock, as I understand your testimony, originally in answer to Mr. Horton's question you said after being at this class in 1930 you understood that the time when a bell was to be rung was when the engine was about to move and start the shifting of a train, is that right?

A. Starting of the shift of any of the work, whether moving the train or moving a light engine, either one.

Q. It doesn't make any difference whether you are moving an engine light or with two cars or twenty cars?

A. When we start to move in the morning, first move in the morning.

Q. When you are going to start thereafter during the time, you start that bell ringing, too, don't you?

A. No, sir.

Q. You don't?

A. No, sir.

Q. Isn't it your understanding, Mr. Hancock, you don't ring the bell continuously while that engine is in motion, and that you don't ring it continuously while it is standing still because those two things would tend to confuse?

A. Yes, sir.

Q. But you do eliminate those two things? You eliminate the continuous ringing of the bell while the engine is in motion, and you eliminate the continuous ringing of the bell while the engine is standing still, and you eliminate those two things so a man can hear a bell when an engine is about to start up from a standing position?

A. Yes, sir.

250 Q. That's correct, isn't it?

A. Yes, sir.

Q. Now, with reference to these persons you are seeking to protect by a warning given by bell of an engine, did the superintendent tell you in this meeting of 1930 that the car clerks, yardmasters, section men and trespassers were to be given special attention as against members of the crew who had been working right around the train?

A. No, sir.

Q. He didn't tell you that, did he?

A. No special instructions, no, sir.

Q. In other words, the superintendent never made any distinction to you between a man classified as a pin puller, field man or switchman whose very duties bring him in and around that very engine that is about to move as against a trespasser that has no business in the yard at all?

A. No, sir, no special instructions.

Q. As far as any warnings to do—when an engine was about to move, they were made to warn everybody and save human life?

A. The movements of the engine were supposed to be understood by all members of the crew.

Q. Whether they were so understood, you couldn't tell if you were an engineer?

A. If he receives a signal to move, he understands every man is in a position to protect himself.

Q. But the engineer is not a party to instructions that are given by the foreman under him, is he?

A. Yes, he is.

Q. Is he a party to them?

251 A. Yes.

Q. The biggest percentage of the time the engineer never even hears the instructions?

A. A lot of times, but not every time. A great number of times when they are going to make special moves outside of the regular routine of work, I instruct the engineer as well as the crew as to the moves to be made.

Q. In other words, if you are going to make optional or special or unusual movements, you, as foreman, adopt the policy of letting the engineer know you are going to make those special movements?

A. Yes.

Q. But the routine things are usually between you and your men?

A. That is usually understood by the crew outside of the engineer.

Q. Sometimes will you, like Stringer,—sometimes your head man in a case of this kind will walk on up towards the rear end of the train up to the next place where the switch is to be lined, sometimes he will ride on up on a stirrup or car near that?

A. Yes.

Q. That is his duty? To stay at the head end?

A. To stay at the head end and protect the next movement of the train.

Q. That is especially true, and you want a man on the engine or some car close to the engine, if that cut of cars is going to go around a curve?

A. I want him in position to relay signals, if necessary.

Q. And, in order to relay signals, if necessary, if something happens at the rear end, you usually want your head man or pin puller to be on the engine or some car close to the engine relaying direction of the movtment?

252 A. Not necessarily on the car, but where he can relay the signals.

Q. I didn't say necessarily on a car, but in a position near the head end?

A. Near the head end of the train.

Mr. Eagleton: That's all.

Redirect Examination by Mr. Horton.

Q. On a track like B-28, is it necessary for the pin puller to stay near the engine to relay any signals?

A. No.

Q. Is it customary for that pin puller to walk on ahead to the lead track after he makes that coupling?

A. When he makes the coupling it is his duty—

Q. In other words, there is no necessity for him to stay around with the engine on that particular track to relay signals?

A. No necessity whatever.

Q. Even though there is a slight curve where the track goes into the lead?

A. No, no necessity at all.

Q. You were asked a trick question by counsel for the plaintiff—

Mr. Eagleton: I object to that.
The Court: The objection will be sustained.
That is a question for the jury.
Q. You were asked a question by counsel for the plaintiff having to do with constant ringing while an engine was standing still, or constant ringing after an engine was moving, if it was eliminated, and whether or not it wasn't eliminated so that a member of the crew could hear the bell when the engine was about to move, and I be-
253 lieve you answered yes. Did you mean by that, or did you mean to infer, that engine bells are rung every time an engine moves?
A. No, sir, they are not.
Q. I didn't think you meant that.
A. No, sir.
Mr. Horton: That's all.
Mr. Eagleton: That's all.

F. W. BRUNING, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. What is your name and address?
A. F. W. Bruning, 1033 Greenlawn Avenue, Peoria, Illinois.
Q. What is your present capacity with the defendant?
A. Locomotive engineer.
Q. How long have you been a locomotive engineer for the defendant, Mr. Bruning?
A. Thirty-two years last November.
Q. During the period of time that you have served in this capacity, have you operated switch engines over the various tracks and properties of this defendant?
A. Yes, sir, I have.
Q. And have you operated switch engines in the East Peoria yards?
A. I have, and I am still operating one there.
254 Q. And during this period of time have you observed the practices and customs of operating switch engines in the East Peoria yards?
A. I have.

Q. Are you familiar with the transportation rules of the defendant?

A. Yes, sir.

Q. Are you familiar with rules 30 and 32 contained in this book?

A. Yes, sir.

Q. Have you been instructed with reference to the interpretation and meaning of rules 30 and 32?

A. I have.

Q. Will you please tell the jury what those instructions were with reference to switching in the East Peoria yards?

A. Well, it's unnecessary use of—ringing the bell and sounding the whistle, only in cases to prevent accidents.

Q. Have you received any instructions as to whether or not those rules require the ringing of a bell every time an engine moves in the East Peoria yards?

A. I did not.

Q. Have you received any instructions that those rules require a bell to be rung every time an engine couples up cars on the tracks?

A. I have not.

Q. Have you received instructions that those rules mean that the bell is not to be rung when the engine is being moved in East Peoria?

A. Not unnecessarily.

Q. And is it left to the engineer's discretion to determine when it is necessary?

A. It is, yes, sir.

255 Q. When is it necessary, Mr. Bruning, to ring a bell when starting an engine in East Peoria?

A. Well, when I see anybody in a dangerous position, probably not paying any attention to the movement of the locomotive, I ring my bell to let them know I am near.

Q. When you don't see a person in a position of danger, or you do not know they are in a position of danger, do you move your engine over there without ringing a bell?

A. I do.

Q. Have you observed whether or not that is what the other engineers do in those yards?

A. I do—yes, sir.

Q. Was that the manner in which those rules were carried out on about July 12, 1940?

A. Yes, sir.

Q. It has been testified to by a witness for the plaintiff that was a custom and practice in switching in the East Peoria yards, that a locomotive engineer who has received a signal to move his engine can not move that engine, and must stand still until he has discovered the whereabouts of every member of the crew. Do you know anything about such a custom and practice?

A. I do not.

Q. Is there such a custom and practice?

A. I never knew it to be in my time.

Q. What is the practice?

A. Whenever I get a signal to move, I move in the ordinary routine of switching.

Q. Even though you don't know where all the members of the crew are?

A. Yes, sir.

256 Q. Have you observed that that is what the other engineers do?

A. They do, yes, sir.

Q. Was that true on or about July 12, 1940?

A. Yes, sir, has been ever since I have been on the P. & P. U.

Q. When you don't see a member of the crew after you have received a signal, you proceed to act under the assumption that he is performing his duties, do you not?

A. And being in a safe place, yes, sir.

Q. What?

A. And being in a safe place.

Q. That is one of his duties? To keep himself in a safe place, is it not?

A. Yes, sir.

Mr. Horton: That's all.

Mr. Eagleton: That's all.

The Court: Call the next witness.

257 JAMES M. BURCH, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to:

Direct Examination by Mr. Horton.

Q. State your name and address.

A. James M. Burch, 103 Sherman, Peoria, Illinois.

Q. What position do you hold with the defendant?

A. Night general yardmaster.

Q. And how long have you acted in that capacity?
A. About a month.
Q. And what was your capacity before that?
A. Assistant yardmaster.
Q. And how long were you assistant yardmaster, approximately?
A. Approximately five years.
Q. Prior to that time, what position, if any, did you hold with this company?
A. Engine foreman, switchman since—
Q. How long have you served the company in all those different capacities, approximately?
A. Since September 20, 1922.
Q. What are the duties of a night yardmaster?
A. The night yardmaster handles all the cars and trains in and about his yard in getting the cars to and from connections, cars from and to repair tracks, and supervisory capacity to see that men do their work properly.
Q. Do your duties require you to be in charge of the operations of the East Peoria yard?
A. Yes, sir.
258 Q. And did that on or about July 12, 1940?
A. Yes, sir.
Q. And it is one of your duties to observe and see whether the rules are being carried out?
A. Yes, sir.
Q. During the period of time that you have been occupying these capacities, have you observed the practices and customs of switching in the East Peoria yards of the defendant?
A. Yes, sir.
Q. Are you familiar with the transportation rules of the defendant?
A. Yes, sir.
Q. And, in particular, are you familiar with rules 30 and 32?
A. Yes, sir.
Q. Have you ever been instructed as to what those rules mean?
A. Yes, sir.
Q. And have you enforced those instructions?
A. Yes, sir, wherever it was necessary.
Q. What are the instructions with reference to rules 30 and 32?

A. The instructions on rules 30 and 32 are that the bell must be rung approaching grade crossings and where—to prevent accidents and, in addition to that, rule 30, rule 32, and it says that the continual use of the—ring the bell, or continual use of the whistle is prohibited.

Q. I see. What are the instructions with reference to the carrying out of those rules in switching in the East Peoria yards?

A. The bell isn't rung.

Q. Is not rung?

A. Is not rung continuously or at any time except when there is someone in danger, or to prevent accidents.

259 Q. State whether or not the instructions are that rules 30 and 32 are to be considered together.

A. Yes, sir.

Q. State whether or not the instructions are that in switching in East Peoria the bell is to be rung or is not to be rung when an engine is about to move.

A. Not unless there is reason for the engineer to think there is a reason that there might be someone in or about the cars to prevent accidents.

Q. Are the bells rung when an engine is about to move for the purpose of warning members of that engineer's switching crew?

A. No, sir.

Q. Is the fact that that engineer, when he receives a signal to move his engine, does not know where all the members of his crew are, is that a reason for ringing the bell?

A. No, sir.

Q. Are the instructions with reference to these rules that the engineer must know that some member of his crew is in a position of danger before he rings the bell?

A. Approximately, yes.

Q. Is the bell rung when an engine is coupling up cars on a track—

A. No, sir.

Q. —for the purpose of taking them out?

A. No, sir.

Q. In coupling up a track there may be several forward movements, and then the movement in reverse to take slack, is that right?

A. Yes, sir.

Q. Is it the instruction under these rules that bells

are rung when cars are being coupled up in that manner?

260 A. No, sir.

Q. Go ahead!

A. Just supposing that they are coupling up this track, and they get a sign from the rear end of the train. The engineer doesn't know at the time whether he is going out with the cars when he starts the engine. He just obeys the signal as it's given, and the cars are moved and, when the cars are in motion and the engine in motion, he probably gets a "highball" to proceed, and sometimes he doesn't get any. He just keeps on going until he gets a stop sign or a sign to stop the cars.

Q. Now, when the cars are all coupled together and the engineer gets a signal to pull out on the lead and take these cars some place else, unless he sees somebody in a position of danger do these rules require him to ring the bell?

A. No, sir.

Mr. Eagleton: I object to that, if the court please, as calling for a conclusion.

The Court: Yes, what the practice is.

Q. What are the instructions in the interpretation of these rules as to causing any duty to ring the bell when an engine moves out of the track to get onto the lead?

A. Well, everyone down there is qualified in every respect as to what his duties are, and he knows the general practice is not to ring the bell when a cut of cars is started.

Mr. Eagleton: I object as not responsive.

The Court: The last part of the answer may stand. The other part may be stricken.

Q. Are those the instructions as to how these rules are to be carried out?

261 A. Yes, sir.

Q. It has been testified to by a witness for the plaintiff that there is a custom and practice in the East Peoria yards that an engineer who has received a signal to move may not move his engine until he investigates and knows that every member of the crew is in a safe position. Do you know of any such practice?

A. No, sir. It isn't practiced.

Q. That is not the practice?

A. No, sir.

Q. What is the practice?

A. The practice is to obey the signals as given, and only in time to prevent accident the bell would be rung, and in extreme cases where they might find someone that might not be listening for the bell they might blow the whistle.

Q. Does the mere fact an engineer can not see the various members of the crew, and doesn't know where they are, mean that he can not start the engine?

A. No, sir. He operates the engine by any signal from any members of the crew.

Q. Does the mere fact he has received a signal to move, and he doesn't know where all the members of the crew are, mean he has to ring the bell?

A. No, sir.

Q. Do you know Harold C. Tennant?

A. Yes, sir.

Q. Have you observed him working as a switchman in these yards?

A. Yes, sir.

Q. And was he working under the conditions that you have referred to?

262 A. Yes, sir. I was working the particular night he got killed.

Q. Did he have an opportunity to observe what the customs were,—

A. Yes, sir.

Q. —and how the rules were being carried out, the same as you were?

A. Yes, sir.

Q. Have you ever observed any of the practices indulged in by Harold C. Tennant while acting as a pin puller?

A. Well, of course, everybody works different, and everyone has little oddities and such as that, but I observed him as going toward the leads. He was in the track, like coupling up 28, or something like that, and he would keep ahead of the engine in most cases.

Q. Did you ever observe what Tennant did with reference to getting up on the engine, or any part of it?

A. Yes, he used to sit up on the pilot of the engine.

Mr. Eagleton: I object as not being any issue in this case.

The Court: He may answer that, his general practice.

Q. There has been evidence introduced here in behalf of the plaintiff as to the habits of the deceased. The field is

open as to evidence on habits. What have you noticed as to the habits of Tennant?

Mr. Eagleton: Plaintiff objects to any evidence of this kind as not being within the pleadings, first, and, secondly, it has nothing to do with the injury or the night in question.

The Court: I am not going into it to any great extent. If you will watch your objections, I think we can take
263 care of them.

(Question read by reporter.).

The Court: What do you mean, "habits"? His work in the yard?

Mr. Horton: I didn't finish my question.

The Court: All right!

Q. What have you noticed as to the actions of Tennant while acting as a pin puller during the times that you observed him working in the East Peoria yard;—

Mr. Eagleton: I make the same objection.

Q. —with reference to climbing up on engines, or any part thereof?

The Court: I think he may answer it.

A. Yes, he used to have a habit of climbing on the front end of the engine.

Q. What part of the front end?

A. On the pilot beam.

Q. Was that a proper place to get?

Mr. Eagleton: I object, if the Court please, as being outside the scope of the pleadings in this case.

The Court: Yes, objection sustained as to that, whether he considered it proper.

A. The whole front of the engine is—there is a footboard and hand holds and grab irons, and there is a pilot beam that runs clear across the front end of the engine.

Q. On the switch engines there is a footboard for men to stand on, isn't there?

A. Yes.

Q. That is put there for that purpose? That is the
264 place for them to stand?

A. Yes, sir.

Q. If they are going to ride on that part of the engine?

A. Yes.

Q. There are hand holds so a man can stand securely and take hold of those hand holds?

A. Yes, sir.

Q. And if he gets up on the pilot beam that is an unusual and improper place?

Mr. Eagleton: I object.

The Court: He answered that.

A. I think so.

Q. And you have observed Tennant getting up there while acting as a pin puller previous to July 12, 1940?

A. Yes, several times.

Q. What is the dangerous character of getting up on the pilot beam?

Mr. Eagleton: I object, wholly immaterial to any issue in this case.

The Court: I think he may answer.

A. Well, he might slip in getting up there, or he might slip in getting down.

Q. It's kind of a high perch?

A. It is high and, of course, he wasn't a tall man, kind of short in stature.

Q. You have seen Tennant get up there and go to sleep?

Mr. Eagleton: I object to that, if the court please.

The Court: Objection sustained.

Q. If a man did get up there and doze off and the engine would start up, he would fall off, wouldn't he?

265 A. He would very easy.

Q. These instructions on rules and customs you have testified to apply to the period on or about July 12, 1940, did it not?

A. Yes, sir.

Mr. Horton: That's all.

Cross-Examination by Mr. Eagleton.

Q. Mr. Burch, did you get your instructions from this same class back in 1930?

A. Well, if I may answer that in my own words: I have been instructed in several classes on several rules, and these rules are standard rules, and I was particularly familiar with the rules before I came here.

Q. Did you get any instructions in this 1930 class?

A. We all got instructions as to all the rules of the book of rules.

Q. What were you instructed that this part of the sentence meant: "The engine bell must be rung when an engine is about to move"?

A. That isn't all the rule.

Q. It isn't all the rule. What does that part of it mean?

A. Just what it says there, but it isn't all the rule. Read the rest of it.

Q. Well, I'll read the rest of it, Mr. Burch: It says: "The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grade, and to prevent accident." Is that what the rule was?

A. Yes, sir.

Q. As I you say your instructions to you mean, and the observance was, to eliminate the first part and the second part, and get down to the third part? Only to ring the
266 bell in order to prevent accident, is that it?

A. No, sir.

Q. That isn't it?

A. It's to prevent accident.

Mr. Horton: He testified he considered the two rules together.

The Court: He has answered.

A. Both rules were considered together.

Q. This is only rule 30.

A. All right.

Q. Rule 30, the part of it that you say you told your men to observe was that part of rule 30 which says "The engine bell must be rung to prevent accident"?

A. I didn't tell any of my men to observe that rule.

Q. You didn't?

A. I am not the instructor on the P. & P. U. Railway.

Q. The instructions you got from the superintendent like the rest of these men were to obey the rules?

A. As to the way you understood it.

Q. To obey them in any way you understood them?

A. No.

Q. To obey them as they are written?

A. The way they are written, and the way that they mean.

Mr. Eagleton: That's all.

Redirect Examination by Mr. Horton.

Q. In other words, you were instructed as to how those rules were to be interpreted in switching in the East
267 Peoria yards, were you not?

A. Correct.

Q. And the instructions were in switching in the East Peoria yard, which has most of the transactions,—

A. That's right.

Q. —and is away from the public?

A. Switching in the East Peoria—

Q. Bells are not rung when an engine is about to be moved unless the engineer knows someone is in a position of danger, is that correct?

A. That's correct.

Mr. Horton: That's all.

Mr. Eagleton: That's all.

Trial recessed at 12:30 o'clock P. M.

Trial resumed at 2 o'clock P. M.

V. E. CISNA, called on behalf of the defendant; and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. What is your name and address?

A. V. E. Cisna, 117 North Elmwood, Peoria, Illinois.

Q. What position do you hold with the defendant in this case?

A. You mean at the present time?

268 Q. Yes.

A. Assistant yardmaster.

Q. And what position did you hold on or about July 12, 1940?

A. Night general yardmaster.

Q. What capacities did you work in prior to that time on this railroad?

A. Switchman. I have been yardmaster for twenty years.

Q. During the time that you have occupied these various capacities, have you observed the methods of switching in the East Peoria yards and the practices and customs that are followed in moving switch engines and cars there?

A. I have.

Q. Are you familiar with the transportation rules of the defendant that have been introduced in evidence here?

A. Yes, sir.

Q. Are you familiar with rules 30 and 32 of this rule book?

A. Yes, sir.

Q. Have you been instructed with reference to the meaning and interpretation of those rules as applied to the East Peoria yards?

A. Yes, sir.

Q. Who instructed you?

A. Mr. Umshler, the superintendent.

Q. What were the instructions that you received?

A. Rules 30 and 32 go together.

Q. And what do they mean with reference to the ringing of bells in the East Peoria yards, according to the instructions?

Mr. Eagleton: I object.

The Court: He may answer.

A. Answer that?

269 The Court: Yes.

A. Well, in yard movements the bell isn't being rung, only when someone is on or near the track, for safety.

Q. State whether or not the rules as you are instructed in them mean that the engine bell will not be rung in switching in the East Peoria yard unless the engineer knows that someone is in a position of danger.

Mr. Eagleton: I object to the form.

Mr. Horton: It is not a leading question.

The Court: He may answer.

A. What is the question?

(Question read by reporter.)

A. That's right.

Q. Under those rules as you have been instructed as to them, are the engine bells rung over there in the East Peoria yard during the operations of coupling up a track?

A. No, sir.

Q. And after a track has been coupled up, and after the crew is ready to move this cut out onto the lead into some other part of the yard, is the engine bell rung when the engine moves in that movement?

A. No, sir.

Q. State whether or not it's ever rung unless the engineer knows that somebody—State whether or not it's ever rung unless the engineer knows somebody is in a position of danger.

A. It's never rung unless there is someone on the track, or for the safety of someone.

Q. And the engineer knows someone is on the track?

A. Yes, sir.

270 Mr. Eagleton: I object to that.

The Court: Yes, objection sustained.

Q. It has been testified to that there is a practice over in the East Peoria yards that an engineer can not move his engine unless he has made an investigation to determine the whereabouts of every member of the crew. Do you know of any such practice as that?

A. That isn't a fact.

Q. What is the fact?

A. Well, in this particular case the practice would be the foreman walking along and taking check of this cut, and a field man, and couple up the track, and let off the brakes. The head man's duty was to tie the engine on and stay toward the head end to see that the switches was moved when they could move out.

Q. Were you the yardmaster on the night of July 12, 1940?

A. Yes, sir.

Q. Were you in charge of the East Peoria yards on that night?

A. Yes, sir.

Q. What are your duties? What were your duties in that capacity?

A. Supervising them.

Q. And do you have anything to do with the enforcement of the transportation rules of the company in these yards?

A. Yes, sir.

Q. It has been charged in this case that, after the cars on track B-28 had been coupled together on the night of July 12, 1940, that after the foreman gave the engineer a signal to reverse his engine the engineer moved his engine out without ringing the bell. Do you have an opinion as to whether that was a proper thing or an improper thing for him to have done?

271 A. Proper.

Mr. Eagleton: Just a minute! I object as invading the province of the jury, and incompetent.

The Court: Yes, I believe the objection will be sustained.

Mr. Horton: This man is an expert in operations.

The Court: Even so, I think it is the jury's province to determine whether or not the rule was the practice or not. His opinion could only be based on his view of the practice over there and, for that reason, I think it should be sustained, as the jury can just as well determine that question as an expert can.

Q. Now, Mr. Cisna, if it is true that Engineer England moved his engine that night out of track B-28 without ringing his bell was that in conformity with the rules of this company as your have been instructed in them, and as the same are interpreted?

A. Same thing.

Mr. Eagleton: I object.

The Court: He may answer that.

Q. It has been charged in this case that Engineer England moved his train of cars out of track B-28 that night without knowing where Switchman Tennant was after Tennant had gotten out of his sight. Was the action of Engineer England in moving that train of cars out without knowing where Tennant was in conformity with the general practices of switching in that yard?

Mr. Eagleton: I object to that, if the court please.

The Court: I think he may answer.

Mr. Eagleton: It invades the province of the jury.

Q. What was the answer?

272 A. You had better read it.

(Question read by reporter.)

A. Yes, sir.

Mr. Horton: That's all.

Mr. Eagleton: That's all.

ROY L. McBRIDE, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. What is your name and address?

A. Roy L. McBride, 500 East Melbourne, Peoria, Illinois.

Q. What is your present position with the company?

A. Acting general yardmaster.

Q. And how long have you had that capacity?

A. Well, about four months.

Q. And what was your capacity before that?

A. Assistant general yardmaster.

Q. And what was your position on or about the night of July 12, 1940?

A. Assistant general yardmaster.

Q. How long have you been employed by the Peoria and Pekin Union Railway Company?

A. Thirty-two years.

Q. In what capacities have you served other than those mentioned?

A. Well, I have been switchman and engine foreman, assistant yardmaster, night general, assistant general.

273 Q. During the period that you have been employed by this company, have you had occasion to observe the practices and customs of switching in the East Peoria yards?

A. I have.

Q. Are you familiar with the transportation rules of the company that have been introduced in evidence here?

A. Yes, sir, I am.

Q. Are you familiar with rules 30 and 32 in this book?

A. Yes, sir.

Q. Have you been instructed as to the meaning and interpretation of those rules as applied to switching in the East Peoria yards?

A. I have, yes.

Q. Who instructed you?

A. Superintendent's office, Mr. Unshler.

Q. What were the instructions that you received?

A. Well, that those two rules would act together as one.

Q. And what were the instructions with reference to the ringing of bells on locomotives in the East Peoria yard?

A. That the bells would not be rung unless the engineer knew that there was somebody in danger.

Q. Now, have you had occasion, in the various capacities in which you have served, to observe how those rules were carried out in East Peoria?

A. I have, yes, sir.

Q. State whether or not they were carried out in accordance with the instructions.

A. They have.

Q. It has been testified to that there was a practice in East Peoria that an engineer, after receiving a sig-

274 nal to move his engine, could not move it unless he either knew where all the men were in his crew, or had investigated to determine their whereabouts. Is there any such rule as that?

A. No, there isn't.

Q. Any such practice as that?

A. No.

Q. What is the practice?

A. Well, the practice is for the engineer to move his engine or train when he gets the signal to do so, without ringing his bell unless he knows there is someone in danger.

Q. Does the mere fact that a pin puller walks around one end of the engine and gets out of sight any indication to an engineer that that man is in a position of danger?

Mr. Eagleton: I object, if the court please.

The Court: Objection sustained.

Q. Under the practices of the company which you have observed in East Peoria, does the fact that a pin puller happens to walk around an engine and get out of sight, and that the engineer then starts his engine without knowing where he is, violate the practices of this company in switching in the East Peoria yards?

Mr. Eagleton: I make the same objection.

The Court: Objection sustained.

Q. Is the action of an engineer who starts his engine in East Peoria without knowing the whereabouts of the pin puller contrary to the rules and practices and customs of switching in East Peoria?

Mr. Eagleton: I object to the form insofar as the rules are concerned.

275 The Court: The rules of practice. He may answer. The objection is overruled.

(Question read by reporter.)

A. No, it is not.

Q. And the practices which you speak of were in effect in 1940, were they?

A. They were, yes, sir.

Mr. Horton: That's all.

Mr. Eagleton: That's all.

The Court: Call the next!

T. R. BEACH, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. What is your name?
A. T. R. Beach.
Q. Where do you live, Mr. Beach?
A. At Mattoon, Illinois.
Q. With what railroad are you employed?
A. Illinois Central.
Q. In what capacity?
A. Trainmaster.
Q. Trainmaster of what particular division?
A. Their Springfield division.
Q. Does that division extend into Peoria?
276 A. Yes, sir, it does.
Q. How long have you occupied that capacity?
A. On this—On the Springfield division since August 1, 1939.
Q. In connection with your duties in that capacity, are you required to come to the City of Peoria and observe the facilities and practices and customs of the P. & P. U. Railway?
A. Yes, sir.
Q. Is the Illinois Central Railway Company a tenant line of the Peoria and Pekin Union Railway Company?
A. They are.
Q. Do its trains operate over the tracks of the defendant railroad here after they connect with them in Pekin?
A. They do.
Q. State where the freight trains of the Illinois Central are run on the tracks of the P. & P. U.
A. They run from Pekin to the East Peoria yard on the P. & P. U. Railroad.
Q. And, in the reverse order, are the trains made up over there, and the Illinois Central trains go out from the East Peoria yards? Is that a fact?
A. They are. They are made up by the P. & P. U. switch engines, and go out over the P. & P. U. tracks.
Q. In connection with your duties, have you observed, during the years that you have been trainmaster for the

Illinois Central on the Springfield division, the practices and customs of switching in the East Peoria yards of the defendant here?

A. I have.

Q. Have you observed the practices as to the ringing of bells on locomotives in switching in the East Peoria yards?

277 A. I have.

Q. Tell the jury what you have observed.

A. The practice that I have observed in the East Peoria yard is the bell is not rung except in cases where the engineer sees someone on the track in danger. The momentary stopping and starting does not cause the engineer to ring the bell.

Q. From your observations have you noticed whether the bell is rung to warn members of the crew working with that particular engine?

A. They are not, only in the case where the engineer would observe some member of the crew or, in fact, anyone, stepping into a dangerous position, or walking in front of a car, to call his attention.

Q. Would the mere fact that a pin puller of an engine, from your observation, walked around the front of an engine and out of view of the engineer be considered by the engineer as being in a dangerous position?

Mr. Eagleton: One minute, please! I object to that.

The Court: Objection sustained.

Q. In view of your observations of the practices, do you know whether the engineers in the East Peoria yards start their engines even though they do not see, or are unable to see, where all the members of the crew are?

Mr. Eagleton: I object because he can't say what the engineer says or knows.

Mr. Horton: I said "unable to see".

The Court: I think he may answer that.

A. They do not always know where their members of the crew are when they start the engine.

278 Mr. Eagleton: I object, and move that answer be stricken out.

The Court: Read the question.

(Question read by reporter.)

The Court: It may be stricken as not responsive.

Q. Can you answer that question now?

A. Yes, I know. Read the question once more, please.

(Question read by reporter.)

A. Yes, I know that they do not know where they are at all times when they start the engine.

Q. That's the custom and practice that you have observed over there?

A. It is.

Mr. Horton: That's all.

Cross-Examination by Mr. Eagleton.

Q. Is the Illinois Central Railroad Company financially interested in the defendant company?

Mr. Horton: I object to that.

The Court: I think he may answer if he knows.

A. I didn't understand the question.

The Court: Read the question.

(Question read by reporter.)

A. I can't answer that from personal knowledge.

Mr. Eagleton: All right. That's all.

279 R. H. ROMANN, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. What is your name and residence?

A. R. H. Romann, 705 North Street.

Q. What position do you hold with the defendant?

A. General roundhouse foreman.

Q. How long have you had that position?

A. Seventeen years.

Q. Are you familiar with the Diesel locomotive, Diesel 200, owned by the defendant?

A. Yes, sir.

Q. Do you know how that engine operates?

A. Yes, sir.

Q. Are you responsible for its maintenance and care?

A. Yes, sir.

Q. Following an accident to Harold C. Tennant on the night of July 12, 1940, state whether or not you were called to investigate or examine that engine.

A. I was called to make an inspection of all the safety appliances on the engine.

Q. And did you make that inspection?
A. Yes, sir.
Q. When?
A. Between 6 and 7 o'clock in the morning; A. M.
Q. Of the same day as the accident?
A. Yes, sir.
280 Q. What, if anything, did you find wrong with that engine?
A. Nothing.
Q. Were all the safety appliances in order?
A. Yes, sir.
Q. Did you examine the wheels or any parts of the engine to see if you could find any traces of this accident?
A. I examined the wheels and all over, eight wheels.
Q. Did you find any blood or flesh or anything?
A. None whatever.
Q. Anything whatever?
A. No.
Q. Did you examine the footboards?
A. Yes, sir.
Q. Did you find any evidence of any shoe slipping on the footboards, or anything?
A. Nothing whatever.
Q. Could you find anything on that engine whatsoever that would give you any trace or any ideas whatever as to how the accident could have occurred?
A. No, sir.
Q. Mr. Romann, that engine uses air brakes, doesn't it?
A. Yes, sir.
Q. When the engine stops, does it stop with an air brake?
A. Yes, sir, straight air brake, unless they got a cut and stop the whole train, and it would be an automatic air brake.
Q. When an engine is engaged in coupling up cars on a track and stops, how does it stop? With the application of straight air?
A. Generally always. Moving in the yard making
281 a cut, they use a straight air brake unless they are delivering the cut to another yard or foreign line, and they use an automatic.
Q. Take a movement like on track B-28 that night.
A. Generally use straight air brake.
Q. Now, when an engineer gets a signal to reverse that engine that's standing still, what's the first thing he does?

A. He reverses the electric control, reverser.
Q. What about the air brake?
A. Sir?
Q. What does he do about the air brake?
A. Releases his brake first.
Q. That is the first thing he does, is it?
A. Yes, sir.
Q. And state whether or not the release of the air brake on Diesel number 200 makes a noise.
A. It does releasing the air.
Q. And did it make a noise whenever the air brake was released on or about July 12, 1940?
A. Yes, sir.
Q. What was the nature of the noise it made?
A. A hissing noise. You can hear it for fifty or seventy-five foot.
Q. Then, in order to move an engine in reverse, move that engine in reverse, what was the next thing an engineer would have to do?
A. He would have to put his reverse in whatever movement he was going to make ahead or backward.
Q. He would have to throw the engine in reverse?
A. Yes, sir.
Q. That was movement number two?
A. Yes.
282 Q. Then what was the third thing he did?
A. Opened up his throttle on his controller.
Q. The hissing of the air brakes, then, would take place before the engine was moved, is that right?
A. Yes, sir.
Q. You say it could be heard for sixty or seventy feet?
A. Fifty or seventy-five foot.
Mr. Horton: That's all.
Mr. Eagleton: That's all.

GEORGE R. MALONEY, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. State your name and residence.
A. George R. Maloney, Rural Route 6, Peoria.
Q. What position do you hold with the defendant?
A. Assistant chief car inspector.
Q. What position did you hold on the night of July 12, 1940?
A. Same; assistant chief car inspector.
Q. I will ask you if, following an accident in the East Peoria yards to Harold C. Tennant on the night of July 12, 1940, you were called over to make an investigation.
A. Yes.
Q. What was the nature of the investigation you made?
A. A thorough examination of every car with par-283 ticular reference to the safety appliances.
Q. Did you make an examination of the wheels of the cars that had been on track B-28, and which were pulled out—
A. Yes, sir.
Q. —at the time Tennant was alleged to have been injured? What did you find on those wheels?
A. On the wheel of one car we found a speck of flesh.
Q. Which car was that with reference to the engine?
A. That I would not be able to say.
Q. Do you know the number of the car?
A. Yes, sir.
Q. Do you know whether or not that was the third car from the engine as they stood before they were pulled out that night?
A. I do not.
Q. What did you find on that wheel?
A. I didn't understand you.
Q. What was it you found on the wheel?
A. A speck of flesh.
Q. Was that on the west side, river side or bluff side?
A. River side of the car; river side of East Peoria.
Q. Your records don't show the number of the car on which you found that place?

A. No, sir.

Q. In what order were these cars when you inspected them? On what track?

A. The cars had been switched to various tracks on the repair track. This car was on G-7.

Mr. Horton: I think that's all.

Mr. Eagleton: That's all.

284 THOMAS ENGLAND, called on behalf of the defendant, and having been first duly sworn testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. What is your name?

A. Thomas England, 1317 Western Avenue, Peoria, Illinois.

Q. You are a retired engineer of the Peoria and Pekin Union Railway Company, aren't you?

A. I am.

Q. When did you retire?

A. November 4, 1940.

Q. And you retired at that time for the purpose of getting a railroad pension?

A. Yes, sir.

Q. How long have you been an engineer for this company?

A. I was promoted in 1914.

Q. You have been acting as an engineer since 1914?

A. Off and on.

Q. And during that period of time have you operated engines all over the tracks and properties of the defendant?

A. I have.

Q. And have you operated engines in the East Peoria yard?

A. I have.

Q. And in that experience have you observed the practices and customs of switching in the East Peoria yard of the defendant?

A. I have.

Q. It has been testified to in this case that there was a practice in the East Peoria yards that an engineer
285 could not move his engine unless he knew that all the members of the crew were in a position of safety. Do

you know anything about such a rule as that, or practice as that?

A. I always practiced that.

Q. How's that?

A. I always practiced that, to find out.

Q. Did you understand the question?

A. No.

Mr. Horton: Read the question.

(Question read by reporter.)

A. No.

Q. Was that the practice?

A. No.

Q. What was the practice, Mr. England?

A. Whenever you got a signal you had to proceed after—from either man you was working with.

Q. Are you familiar with the transportation rules of this company?

A. I have read them and studied them.

Q. And have you been instructed in them?

A. I was instructed in 1930 or—yes, 1930.

Q. And are you familiar, Mr. England, with rules 30 and 32—

A. Yes, sir.

Q. —in this book? They have to do with the ringing of bells, do they not?

A. The two comply together, 30 and 32; that's the way I always took it.

The Court: Speak so counsel can hear you.

Q. I just asked a short question you can answer "yes" or "no". I asked if you are familiar with rules 30 and 32.

286 A. Yes, sir.

Q. And whether you had been instructed in those rules.

A. I was in 1930, went through the whole book.

Q. What instructions, if any, did you receive with reference to those rules as pertaining to their application in the East Peoria yards?

A. Well, we—

Q. What instructions did you receive?

A. No instructions whatever, only went by the book of rules.

Q. Now, were rules 30 and 32 applied in switching in the East Peoria yards?

A. Well, they were used to—whenever you needed to ring the bell you would use it, and when you didn't need to use it you didn't ring the bell.

Q. When was it necessary under these rules to ring a bell when switching engines in the East Peoria yards?

A. No practice whatever.

Mr. Eagleton: We object to that because the rules speak for themselves. He is not speaking of instructions. He said he never had any instructions.

The Court: Read the question?

(Question read by reporter.)

Q. In accordance with your instructions?

Mr. Eagleton: He said he never had any.

The Court: Did you ever have any instructions about these rules? Anybody ever talk to you about these particular rules?

A. We talked it over.

The Court: Who talked it over?

287 A. When we had the class in 1930.

The Court: Who was there then?

A. Mr. Umshler.

The Court: And that is the time you discussed these rules?

A. Yes, sir.

The Court: I think he may answer. Now read the original question.

(Following questions read by reporter:

"Q. When was it necessary under these rules to ring a bell when switching engines in the East Peoria yards?

"Q. In accordance with your instructions?")

A. Well, I always practiced ringing over crossings and not when I was given a signal to move or anything, and knew where the crew was.

The Court: They can't hear you. The attorneys can't hear you, and the jury.

Q. Now, Mr. England, confine your answer to switching in the East Peoria yards where there were no grade crossings.

A. Well, we never practiced that, to ring the bell while we was switching in the yard, in the East Peoria yard at night.

Q. State whether or not you were instructed that these rules meant that you were not to bring a bell when moving an engine in the East Peoria yards unless you, as an engineer, knew that somebody was in a position of danger.

Mr. Eagleton: I want to object to the leading form of this examination. I think he should ask the witness what instructions, if any, he was given instead of putting the words in his mouth.

288 Mr. Horton: I am not putting the words in his mouth.

The Court: Let's read the question.

(Question read by reporter.)

The Court: Objection overruled. He may answer. Do you understand the question?

A. Yes, sir.

The Court: All right, answer it.

Mr. Horton: Better read the question again.

(Question read by reporter.)

A. That was— Yes.

Q. You are not particularly well now, are you, Mr. England?

A. No, sir.

Q. State whether on the night of July 12, 1940, you were the engineer in the crew in which Tennant was a member. Were you?

A. Yes, sir.

Q. And that was the East Peoria industry job, was it not?

A. Yes, sir.

Q. About how long had you been on that job?

A. Well, I have been on there a year I know of regular.

Q. Prior to the time of that accident?

A. Yes, sir.

Q. And what engine were you using?

A. Sometimes 200, sometimes 100.

Q. On the night of July 12, 1940, what engine were you using?

A. 200.

Q. And who was your fireman?

A. R. E. Cole.

Q. Who was the foreman?

A. Harkless.

289 Q. Who was the field man?

A. Bonner.

Q. And who was the pin puller or man following the engine?

A. Tennant.

Q. That East Peoria industry job carried on certain routine movements at that time, did it not?

A. Yes, sir.

Q. And one of them was the pulling of the cars that were placed on track B-28, and the taking of those cars down to the "rip" or repair track, is that right?

A. Yes, sir.

Q. And sometime during the night your crew would always go in and perform that movement?

A. Yes, sir.

Q. Do you know whether or not Tennant had worked with you on previous nights in doing this same work?

A. He had.

Q. And in what capacity?

A. As pin puller.

Q. What particular movement was required to get into that track?

How did you get into that track?

A. On the belt from 41 up to 28.

Q. I mean on ordinary occasions you would have to get the engine on the middle lead—

A. Yes, sir.

Q. —to get into that track, would you not?

A. Yes, sir.

Q. And then there is a switch called the "B-28 switch" that's on the lead, isn't there?

289 A. Yes, sir.

Q. Then you go in on that, and then you come to another switch called the "divide B-28 switch"?

A. Yes, sir.

Q. Then, after you go through the divide B-28 switch, then you are on track B-28, a perfectly straight track, is that right?

A. Yes, sir.

Q. On the night in question just before the Tennant accident, I believe your engine had been doing some switching on some of the tracks to the east of track B-28.

A. Yes, sir.

Q. And then how did you know that the next movement was going to be the pulling of the cars that were on B-28?

A. I just went according to the signal.

Q. You got a signal from somebody?

A. Yes, sir.

Q. That meant that you were to go over and get on track B-28?

A. Yes, sir.

Q. Who was with you on the engine when you went over there?

A. Tennant was on the engine.

Q. What part of the engine?

A. Front part, the end of the engine.

Q. That was the front of the engine, too, wasn't it?

A. Yes, the head of the engine.

Q. And you were on the west side of the engine at the engineer's box, were you not?

A. Yes, sir.

Q. And Fireman Cole was also sitting in the cab, was he, with you?

A. Yes, sir.

290 Q. Now, I presume you got onto this middle or 20 lead, and went along that to a place beyond B-28 switch, did you?

A. Yes, sir. I had some switching to do there.

Q. Then you had to get into track B-28 then?

A. Yes, sir.

Q. And state whether or not Tennant lined the switches for you to go in there.

A. Yes, sir.

Q. He did that, did he?

A. Yes, sir.

Q. And your engine went in over the B-28 divide switch headed in a southerly direction, did it?

A. Yes, sir.

Q. How far was it to the first car on that track? That was standing on that track?

A. Just one car length from the dividing switch.

Q. Did your engine couple onto that car?

A. Yes, sir.

Q. Who made that coupling?

A. Tennant.

Q. And how many cars did you get to go on that particular move? Do you know? Just the one?

A. One or two, I don't know which.

Q. Where was Bonner and where was Harkless at that time?

A. They were walking south on 28.

Q. Were they on the west side?

A. On the west side, yes, sir.

Q. And the west side was the side you expected to get your signals on?

291 A. Yes, sir.

Q. After you coupled onto the first car, I presume you were looking toward the south then for signals?

A. Yes, sir.

Q. And did you get a signal of some kind?

A. I got a signal to reverse backwards.

Q. Whom did you get that from?

A. Well, after they made the joint I don't know whether it was Bonner or Tennant. I think it was Tennant, though, I couldn't tell exactly which one it was, but I got a signal, and I seen both of them there.

Q. What did you do after you got that signal?

A. I moved backwards.

Q. About how far?

A. Not over eight or ten feet, anyhow.

Q. Then did you get another signal from somebody?

A. I got a stop sign, yes, sir.

Q. Got a stop sign?

A. Yes, sir.

Q. Did you get another signal?

A. After they found out there was a joint open, then I got a signal to come ahead.

Q. Whom did you get that from?

A. From Bonner.

Q. And did you go ahead then with your engine?

A. I did.

Q. Did you see Tennant or what happened to him during that operation?

292 A. He was standing on the footboard of the front of the engine at that time.

Q. And then after you went ahead in compliance with this last signal do you know how many cars that got together on the track? I don't suppose you would.

A. I think about ten cars, ten or eleven cars we had.

Q. And then were you stopped, then, at that point or still pushing ahead?

A. No, sir, we was stopped.

Q. Did you get a signal to stop?

A. Yes, sir.

Q. Then state whether or not you got still another signal from someone.

A. I got another signal (from I don't know whether it was Bonner or Harkless) to come ahead.

Q. Was that signal from pretty far on down the track?

A. Yes, it was ten or eleven cars, ten cars, anyhow, nine or ten cars from the engine.

Q. What did you do then in obedience to that signal?

A. I moved ahead until I got a stop sign.

Q. About how many car lengths did you shove ahead on that occasion?

A. Five or six car lengths.

Q. And made a coupling down there, did you?

A. We did.

Q. Then did you get a signal to reverse the engine?

A. I had a signal to reverse.

Q. What is the purpose of the reverse right after you couple on?

A. To find out whether the cars is coupled together or not.

Q. Is that what you call "slacking"?

293 A. Yes, sir.

Q. And you got the slack, and then did you get a signal to stop?

A. Yes, sir.

Q. Then did you get any more signals immediately following that?

A. Not for about ten minutes.

Q. Well, all the cars on the track were together then, weren't they?

A. I couldn't tell you that.

Q. And what about Tennant? Where was he at this time after you had made this last push in a southerly direction some five or six car lengths and stopped?

A. He was standing alongside of the cab putting his raincoat under the cab in a box they had for to put their clothes in.

Q. It had been raining just before?

A. It had been raining that night before we come back from the "Tip Up".

Q. Is there a box or compartment of some kind underneath your cab window?

A. Yes, sir, there is a compartment in under the cab.

Q. Just what did you see him do?

A. He put his raincoat in and got his cap and his jacket out and put that on, and he walked around the engine and that was the last I saw of him that night.

Q. What end of the engine did he walk around?

A. The north end of the engine.

Q. That is the rear end of the engine?
A. The rear end, yes, sir.
Q. What duties did Tennant have to perform at that time?
A. He had none to perform after he made that first coupling.
Q. He had none to perform with reference to coupling up the track?
294 A. No, sir.
Q. But after he walked around the engine what duties did he have to perform?
A. He had to go out on the lead and find out whether the switch was lined for us or no, but I never looked back to see which way he went after he left the engine.
Q. He walked around out of your vision, did he?
A. He did.
Q. How far in from the point of the divide B-28 switch were you standing at that time? How many car lengths?
A. Well, about five or six car lengths.
Q. And how long is a car length?
A. Well, about forty foot.
Q. Then after Tennant had walked around the end of the engine and got out of your vision, state whether or not you continued to look south along the west side of this train for signals.
A. I did. I looked for a signal.
Q. How long a wait was there?
A. I think about ten minutes, anyhow; five or ten minutes, anyhow.
Q. Was it ten minutes after you last saw Tennant?
A. Yes, sir.
Q. And state whether you finally got a signal from somebody.
A. I got a signal from the rear end to back up and I backed up, and I never got a stop signal and I kept backing up all the ways out to the lead.
Q. Where did you intend to go with these cars?
A. Over on the hammer track on 41.
Q. What ways were there you could get in there on
295 the hammer track from track B-28?
A. Well, we had to pull back twenty car lengths, anyhow, and—
Q. You had to go out onto 20 lead, didn't you? The middle lead?

A. We went out the middle lead, up the Nickel Plate main, what we call "Nickel Plate main", and we proceeded because the switches were all lined for me to go that way. That was the way we come back from the "Tip Up".

Q. And how far up the Nickel Plate lead did you continue with this cut of cars?

A. Up to Herschel Street, and I asked the fireman if he could see anybody and he said no, and I stopped because I didn't want to get around a curve, and I got down on the ground and looked because he always got off at that 41 switch; you know, to throw that switch.

Q. State whether or not you pulled these cars out on the Nickel Plate lead far enough so that the rear end would clear the 41 switch.

A. Yes, sir.

Q. And the next operation was for someone to throw the 41 switch, and then you would back down—

A. After I got a signal.

Q. But you stood up there waiting for a signal to back up?

A. I was waiting for a signal to come ahead.

Q. Because you were headed south, weren't you?

A. Backing up south, or north.

Q. You expected to get a signal at that point from Tennant, did you not?

A. Yes, sir.

Q. And you didn't get it?

296 A. No, sir.

Q. Now, was that movement performed substantially in that manner on the previous nights on which you worked on this assignment?

A. That was the regular routine of work every night.

Q. And ordinarily state whether or not, after Tennant made the first coupling, he would walk around the north end of the engine just the same as this.

A. Yes, sir, every night that he was on the job.

Q. And on all these previous nights Tennant had worked with you, after he had walked around the north end of the engine state whether you would get a signal from the foreman to back up and pull out of that track.

A. The foreman and the field man, they would cut across to line the hammer track up, and all I would have would be one man.

Q. That was done night after night, also?

A. Yes, sir, every night.

Q. The foreman would give you a signal to back out and pull up on the lead, and then the foreman and field man would cut across the yards over to the hammer track to line some switches over there?

A. To the hammer track to line up.

Q. And you would pull up on the lead just the same as you did on the night of July 12, 1940?

A. Just the same.

Q. And Tennant would finally show up at the B-41 switch?

A. Yes, sir.

Q. And after your cut, on the previous nights after your cut would have cleared that switch, you always previously got a signal from Tennant—

297 A. To come ahead.

Q. —to come ahead down through B-41 switch?

A. Yes, sir.

Q. Now, state whether, on the night of July 12, 1940, after you got the signal to back up out of that track, whether you rang the bell.

A. Never did.

Q. And you didn't ring it that night, either?

A. Until we got down to the crossing.

Q. Did you know where Tennant was when you started that engine?

A. I never did know where he was any night he would walk away from the engine. That would be the last until—

Q. And, on this particular night you didn't know where he was, did you?

A. No, sir.

Q. On the night previous to this when you pulled up on the lead track over 41 switch and then got ready to shove back down, you found Tennant there at that switch, didn't you?

A. Yes, sir.

Q. And on the previous night, after they coupled up the first car, he walked around the north end of the engine just the same way?

A. The same way.

Q. And that was the routine thing on all previous nights when he worked with you, is that right?

A. Yes, sir.

Mr. Horton: That's all.

298 *Cross-Examination by Mr. Eagleton.*

Q. Mr. England, when you first went on the stand I understood Mr. Horton to ask you a question about whether or not you ever move your engine unless you know that the men in the crew were in a place of safety, and I understood you to answer "I always practiced that." Is that correct?

A. Would I find out where they were?

Q. Yes, to see if they were in safety before you moved.

A. I would look around to see if I saw anybody, yes, sir.

Q. That was your practice and custom, was it?

A. To look out and see if I could see anybody.

Q. On this occasion before you started up your engine on the occasion when Tennant was injured, or that night or early morning of July 12, did you look toward the footboard of your engine to see if he was riding there before you started up?

A. I didn't get down on the ground and look, no.

Q. I mean from the cab of your engine.

A. I looked back, yes, sir.

Q. I mean to the footboard, not back.

Q. I couldn't see nobody on the back footboard.

Q. Did you look on the front footboard? Front footboard of the engine?

A. Yes, sir, I was looking south when I got a signal.

Q. If anybody was on the front footboard of the engine, do you think you could see them?

A. Yes, sir.

Q. Is that the place where Tennant ordinarily rode back from the coupling up to the time he got off for the 41 switch?

299 A. No, sir. I told you he generally would walk away, and walk down to the switches.

Q. Didn't you say, in answer to one of your questions, "That is where he usually gets off, at the 41 switch"?

A. No, I didn't.

Q. Did he ordinarily walk back to the 41 switch or ride back to the 41 switch?

A. Well, if he was staying with the engine he would.

Q. In other words, that would determine—or depend, rather—on what instructions he had got from his foreman, would it not?

A. No, sir.

Q. You don't give Tennant any instructions, do you?
A. No, sir.
Q. Whatever instructions he gets with reference to the duties he is to perform, they come from the foreman, is that right?
A. Yes, sir.
Q. Sometimes if he would stay with the engine, or close to the engine, he would ride up to the 41 switch, is that right?
A. If he was there to ride up to the 41 switch.
Q. Well, when he made this coupling between the engine and the first car, and you think there were two cars in that group, if he stayed with the engine and rode up to 41 switch, he could ride either on the engine where you were, or ride on one of the cars up near the head of the engine, isn't that right?
A. Yes, but I would see him.
Q. And that happened from time to time, did it?
A. Yes.
Q. Is that right?
A. Well, I told you he walked some nights, and some nights—
300 Q. That is what I want to get at. Some nights he would walk, and some nights he would ride, is that it?
A. Yes.
Q. When do you say you saw Tennant put his raincoat away in this box under the cab of the engine and start north? You say you saw that on July 12.
A. Sure.
Q. And you saw him start north toward the rear of the engine, is that right?
A. That is the last move I seen him make.
Q. Did you, from that time on, keep on looking south?
A. I had to.
Q. Well, you did?
A. Yes, sir.
Q. And you kept your head out of the cab, did you?
A. Yes.
Q. Did Tennant ever return on your side and come down there again on your side?
A. Well, that's what I say.
Q. Did he?
A. I didn't see him.
Q. And you were looking? Were you?

A. I was looking, yes.

Q. Now, at the place where you later found his hand, cap and lantern, if this were the place right there where his hand, cap and lantern were—

Mr. Horton: I didn't go into that. It is improper cross-examination.

The Court: I don't believe there is any testimony
301 he saw his hand, cap and lantern.

Mr. Horton: I didn't ask him that.

The Court: I don't remember that he did.

(Discussion between court and counsel out of the hearing of the jury.)

Q. Mr. England, did you, after this accident occurred and after you found the body of Tennant, did you see where this hand, lantern and—or cap, lantern and hand were?

A. I saw the lantern sitting in the middle of the track.

Q. Yes?

A. And then we come back to look to see if we could see the body.

Q. You saw the lantern sitting in the middle of the track?

A. Yes.

Q. Did you see at that same place or close by it the hand?

A. I didn't examine that part.

Q. You didn't see that?

A. No, sir.

Q. Did you see his cap?

A. No.

Mr. Horton: No evidence he even walked down there.

The Court: He stated he didn't see it.

Q. Which did you discover first, because I want to find out which direction you were coming? Which did you discover first? The lantern or the body?

A. The body.

Q. Where was the lantern with reference to the body? How far south of the body was the lantern?

A. Well, I judge three hundred feet.

Q. Three hundred feet south of it, and the body
302 itself was right opposite this divide switch, was it?

A. Yes, sir.

Q. There is a spring marked on Defendant's 1, on B-28.

A. Yes, I saw that.

Q. Is that about where you saw the lantern?

A. I couldn't just tell exactly the amount of feet or anything like that.

Q. I will show you Defendant's Exhibit 3, and ask you if you see the switch stand in that picture near which his body was found.

A. Yes, sir.

Q. Is that one right here (indicating)?

A. Yes.

Q. The first one that shows, the first switch stand that shows at the right hand side of Defendant's Exhibit 3?

A. Yes, sir.

Q. Now, the lantern, as you are looking at this picture, Defendant's Exhibit 3,—You are looking south, are you?

A. Yes.

Q. And the lantern was found on down south from there about three hundred feet?

A. I judge that far.

Q. I will ask you if that place where the lantern was after you discovered the body, if the place where you saw the lantern is the same place where the front end of your engine had stopped.

A. I couldn't tell that.

Mr. Horton: I object to that.

The Court: He answered, said he couldn't tell.

Q. Is that approximately—Without being exact about it, was that approximately where the front end of
303 your engine had stopped when you finished coupling up track B-28?

A. I couldn't tell that.

Q. I will ask you: Do you remember when your deposition was taken, Mr. England?

Mr. Horton: Just a minute, Your Honor!

If he is going to pull out any deposition—This is improper cross-examination, anyway. He has gotten into a field I didn't touch in the direct examination.

The Court: I think he has a right to inquire from him in regard to that.

Q. Mr. England, your deposition was taken, I believe, on December 5, 1941, here in the Judge's chambers?

A. Yes, I guess so.

Q. And you were sworn by Miss Reynolds, the reporter here, to tell the truth before your deposition was taken?

A. Yes, sir.

Q. Do you remember that Mr. Horton asked you that question on page 41, question by Mr. Horton? I will read you this question and this answer, and see if it refreshes your recollection as to the facts as to where the south end of your engine was at the time you made the last movement to the south on track B-28, with reference to the point where you later saw this lantern: By Mr. Horton: "Question 137. From your investigation as to where his body was found, would you say that the first—Well, from your investigation as to where his body was found, and where the light was found and his hand, would you say that the light and the hand were about where your engine had been standing after you had completed shoving the cut?

304 "A. Yes."

Is that right?

A. I couldn't tell that.

Q. Well, then, at the time you made this answer to this question in your deposition, you were mistaken possibly?

A. I might have been.

Q. At any rate, you never had been south of the point where you found that lantern? You had never been south of that point with your engine, had you, that evening?

Mr. Horton: I object to the form. It assumes this man found the lantern.

The Court: I think he may answer if he knows whether he was south of where the lantern was.

Mr. Horton: No evidence this witness left the engine and walked down there. The evidence is when they made the investigation the engine never went beyond the body, never went farther into the track.

The Court: Let's have the question read.

(Question read by reporter.)

The Court: Are you able to say whether you had been south?

A. I never went that far down after I saw the body.

Q. When you saw the body, as I understand it, you stopped your engine—

A. Yes, sir.

Q. —about even with where the body was?

A. Yes.

Q. Or about ten or fifteen feet north, is that right?

A. Yes.

305 Q. And the light of the engine was shining on the body?

A. Yes, sir.

Q. And you never moved your engine south of that point where the body was after you discovered it?

A. No, sir.

Q. But you got off of your engine and walked to the south where the lantern was?

A. I never got that far.

Q. Did you get down?

A. I walked a ways and saw the light, and turned around and come back.

Q. What I am asking you is not related to the movements of your engine after you discovered the body. What I am asking you, or want to ask you, is when you were coupling up this train did you ever bring your engine any point farther south than where you saw the lantern that evening?

A. I couldn't tell that.

Q. Ordinarily, Mr. England, with reference to a member of the crew, when he's not in view, whether he be the field man or head man or any other member of the crew, when he is not in view when you are going to move the engine, whose duty is it to see that he gets out where he can be seen before a signal is given?

A. I don't understand the question.

The Court: Read it again.

(Question read by reporter.)

A. Well, we are moving already, ain't we?

Q. No, suppose your engine is standing still on a track such as B-28, then whose duty is to see to it
306 that the men or crew are all accounted for before you move that engine?

Mr. Horton: The question assumes it is anybody's duty.

The Court: He is asking if it is, I take it.

A. It's what—My practice was he was supposed to look out for himself. That was our practice, and after I got a signal I was supposed to move according to my signal.

Q. Was it ever your thought, Mr. England, in that respect that it was the foreman's duty to see to it that the crew was present and accounted for before he gave a signal to move the engine?

Mr. Horton: I object on the ground the witness answered the question.

The Court: Objection sustained.

Q. Mr. England, I am going to show you here a statement, and ask you if this statement is signed by you and bears your name.

A. Well, that's my name.

Q. Did you write that there?

A. I did, but I didn't read it.

Q. You didn't read it?

A. No, sir, I don't know what he put on it.

Mr. Horton: I would like to see this before he asks any more questions.

Mr. Eagleton: I want to ask about identifying his signature.

The Court: You can identify the signature.

Q. Who wrote on the bottom of that? Who wrote the words "Read O. K." in addition to "Thomas England"? Who did?

A. I did.

Q. And on the page ahead of it also the signature
307 "Thomas England", did you write that i your handwriting?

A. I did.

Q. With an indelible pencil?

A. Yes, sir.

Q. And the words "Read O. K.", who wrote that?

A. I done that.

Q. And on the first page the signature "Thomas England", "Read O. K."?

A. Yes, sir.

Q. Did you write that?

A. Yes, sir, that was the testimony of what was taken that afternoon. That was the way I understood, but I didn't have time to read it.

Q. You did mark down the words "Read O. K."?

A. I took his word that was just what he was taking from me. That was my testimony.

The Court: Is that all with this witness?

Mr. Eagleton: No, I wanted to give Mr. Horton a chance to read the statement.

(Recess.)

The Court: You may proceed.

Q. Mr. England, I will ask you if, in that statement, this statement was made—You refer to it as "testimony".

It was a statement that was made and taken at your home on the 11th day of August, 1941, was it not?

A. There was a statement taken there, but I never read the statement.

Q. Never read it at all?

A. Never read it at all.

Q. I will ask you if it isn't a fact, Mr. England, that you took a very, very considerable time to read it, and to
308 read it over carefully, and then to mark on it "Read O. K."?

A. That was Mr. Casey. He told me to put "O. K." after that.

Mr. Horton: I object to further examination on this.

The Court: Yes, he stated he didn't read it.

Q. Mr. Casey is the gentleman who took the statement from you? He is the young lawyer here, isn't he?

A. Yes.

Q. At your home?

A. He did.

Q. I will ask you if, at that time, Mr. England, among other things if you didn't say this to Mr. Casey: "It is the usual practice and custom that a train should not be moved while a man is missing. This rule is observed in the Peoria and Pekin yards." Is that right? Did you make that statement to him?

A. I did not make the statement.

Q. You did not make the statement?

A. No, sir.

Q. With reference to the episodes leading up to finding this lantern, I will ask you if you didn't testify to this even at the time your deposition was taken, page 21, speaking of where you stopped your engine, and how far north of the body—

Mr. Horton: What question is that?

The Court: What are you reading from? The deposition?

Mr. Eagleton: Yes, page 195.

Mr. Horton: No page 195.

Mr. Eagleton: That is my error.

Q. "North of it about ten or fifteen feet"? And continuing on question 196: "Ten or fifteen feet?" "A. Yes." "You had a light on the front end of your engine?" "A. Yes, sir."

309 "Was it the light from your engine that shone on his body?

"Yes, sir.

"Then you got off of your engine there?

"Yes, sir.

"When you walked to find the rest of the body, which way did you walk? Back to the north, or further on south?

"South.

"How far south of that point where his torse was lying did you find any other part of his body?

"Well, about four or five cars in, anyhow.

"Q. Four or five cars south of that point?

"A. Yes, sir.

"Q. What did you find there?

"A. We found his lantern.

"Q. Lantern?

"A. And his cap.

"Q. And cap?

"A. Yes.

"Q. Anything else?

"A. His hand, I think.

"Q. And what else?

"A. That's all I remember.

"Q. Did you find blood there?

"A. There was a little blood alongside the rail."

Do you remember those questions and answers being given by you at that time your deposition was taken, Mr. England?

A. I did.

Q. They were true, were they?

A. Yes, sir.

319 Q. Now, when Mr. Horton asked you this question—I will read it to you again, question 137, on page 41:

"From your investigation as to where his body was found, would you say that the first—Well, from your investigation as to where his body was found, and where the light was found and his hand, would you say that the light and the hand were about where your engine had been standing after you had completed shoving the cut?

"Yes."

Do you remember that answer being given to that question?

A. I did not.

Q. When you say you did not, you mean you didn't make that answer?

A. I didn't make that answer.

Q. With reference to the practice of ringing a bell if any of the workmen in the crew are interested in their work or otherwise engrossed at the time you were about to move an egine, I want to ask you about this matter, the question and answer that was made in your deposition on page 147, the last question. It says "Rerecross Interrogatory Number 1 (question by Mr. Eagleton) Something was said here, Mr. England, about ringing the bell when you are about to start the engine whenever any of the members of the crew are engrossed in their work or interested in their work, where they might need a warning. Do you ever ring a bell under those circumstances?

"A. I do.

"Q. I mean in the switching yards, the 'B' yards. Is that right?

"A. Yes."

Did you make those answers to those questions?

311 A. Yes, sir.

Q. Are they true?

A. To my knowledge.

Q. With reference to your deposition on the question of holding the engine still when a man is missing, I will ask you if you were asked these questions on page 24 of your deposition:

"Q. 238. Whose duty was it to hold the engine still if a man is or was missing?

"A. Foreman.

"Q. The foreman's duty?

"A. Yes."

Is that right? Did you make those answers to those questions?

A. That is not so.

Q. Did you make those answers to those questions?

A. I believe I did, but I don't remember.

Q. You don't remember?

A. No.

Q. At the time your deposition was taken, Mr. England, did you know at that time that there was such a rule as rule 30 in the rule books?

A. Rule 30?

Q. Yes.

A. Yes, I did.

Q. Did you know the substance of the rule? What it was, rule 30?

A. I did.

Q. You did? With reference to that signal business again, page 28:

"Q. 273. Do I understand you to say now that, with a member of the crew missing, you consider it all right for the foreman to go ahead and give a signal?

312 "Mr. Horton: Well, I object to the form of that question.

"A. I never had it happen that way in my thirty-one years' service.

"Q. You never saw that happen that way?

"A. No, sir."

Did you make those answers to those questions?

A. To my knowledge, I guess I did.

Q. Were they true?

A. I never had it happen.

Q. The only way, Mr. England, that you can determine whether or not anyone is in danger is by looking out, isn't it? Looking out the cab of your engine?

A. Yes, sir.

Q. And do you always keep a steady lookout in order to determine whether or not the men have gone in between the ends of the cars?

A. They never do.

Q. You never have had that happen in your experience?

A. Never had it happen.

Q. Never have had a man disappear in all your experience between the ends of the cars?

A. Not while we was working.

Q. Will you see if this refreshes your recollection on that phase of the matter, page 48, question 8:

"With reference to whether or not a member of the crew is engrossed in his work or is interesfed in something that he is doing so that he needs a bell to warn him, how do you go about determining that fact? By keeping a lookout?

"A. If I see a man going in between cars, I will not move until he comes out to show himself.

313 "Q. You determine that by keeping a lookout?

"A. Yes, sir."

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Those questions were asked and those answers given?

A. Yes, sir.

Q. And they were true?
A. Yes, sir.
Q. And the next question following on:
"Under those circumstances, too, you do ring a bell, too, as a warning?
"A. When it's necessary.
"Q. When you think it is necessary?
"A. Yes.
"Q. And that happens frequently, does it,—
"A. Yes, sir."
A. Not to my knowledge.
Q. You mean that part isn't to your knowledge? Will you say you gave those answers to those questions at that time, Mr. England, or not?
A. About the bell ringing?
Q. Yes, and ringing frequently, under these answers to these last questions I gave you?
A. I didn't get the question.
Q. Questions 8, 9 and 10 and 11, pages 48 and 49. Your answer was:
"If I see a man going in between cars, I will not move until he comes out to show himself.
"You determine that by keeping a lookout?
314 "Yes, sir.
"Under those circumstances, too, you do ring a bell, too, as a warning?
"When it's necessary.
"When you think it is necessary?
"Yes.
"And that happens frequently, does it,—
"Yes, sir."
Were those questions asked you and those answers given at that time?
A. Yes, sir.
Q. Were they true?
A. Yes, sir.
Q. True then and now, were they?
A. Yes, sir.
Q. At the time your deposition was taken, Mr. England, of course, Mr. Horton was there and I was there, asking you questions, along with the reporter taking it down. At the time your deposition was taken, Mr. England, do you say you knew there was a rule such as rule 30 at the time?
A. I did.

Q. You did know it?

A. Yes.

Q. Question by Mr. Horton here, I want to ask you if this refreshes your recollection—

Mr. Horton: Where?

Mr. Eagleton: Page 46.

Q. "Q. 2. And although you may not have been instructed by any superior officer not to ring bells during ordinary switching movements over in the 'B' yard
315 in East Peoria, yet during those years, if there is such a rule, it has never been complied with, has it?"

Mr. Horton: I object to picking questions out hit and miss. He's at a point on recross examination, I think, in this deposition, and it is misinforming the jury as to the intent. He can't pick out something without giving what went before.

The Court: You can correct it. I think he can ask if he said certain things for the impeachment.

Q. This question again:

"And although you may not have been instructed by any superior officer not to ring bells during ordinary switching movements over in the 'B' yard in East Peoria, yet during those years, if there is such a rule, it has never been complied with, has it?

"A. No.

"And that is the usual and ordinary practice in switching over there?

"Yes, that was the practice.

"Not to comply with any rule, if there is any, which would require bell ringing whenever an engine is moved in switching?

"Yes."

Do you remember those questions and answers being given?

A. Yes, sir.

Q. They are true then and now?

A. Yes, sir.

Q. Were you ever called in after that 1930 class was held and given any special instructions by the yardmaster or the superintendent or Mr. Keeler or anyone else with reference to ringing bells or not ringing bells when your engine was about to start from a stationary position?
316 A. No, sir.

Mr. Eagleton: All right! That's all.

Redirect Examination by Mr. Horton.

Q. In these various questions that were asked you on the deposition by Mr. Eagleton referring to members of the crew which were missing, and to which you gave answers, what do you mean by a "missing man on a crew"? What is considered a missing man?

A. A man—What I consider a missing man, I don't know where he's at.

Q. And in the case of the man named Tennant, in the case of Tennant, the pin puller, walking ahead around the engine, you thought you knew where he was, didn't you?

A. I thought I did, that—

Q. And you thought—

A. —he was out on the 41 switch or somewhere out there.

Q. You thought he had walked down to the switch, didn't you?

A. Yes, sir.

Q. So you didn't consider him a missing man, did you?

A. No, sir.

Q. Isn't a missing man on a crew somebody that has gotten down underneath the cars and is not performing his duty, or has gone off some place?

Mr. Eagleton: I object; leading and suggestive.

A. Yes, sir.

The Court: It is leading, but he has answered.

Mr. Horton: That's all.

Mr. Eagleton: That's all.

317 R. E. COLE, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. Will you state your name and address?

A. R. E. Cole, 229 Lydia, Peoria, Illinois.

Q. Are you employed by the Peoria and Pekin Union?

A. Yes, sir.

Q. In what capacity?

A. I'm ~~a motorman~~ helper.

Q. And what capacity did you hold on the morning of July 12, 1940?

A. Motorman helper.

Q. How long have you worked for the Peoria and Pekin Union?

A. Oh, about twenty-seven years.

Q. In what capacities have you worked?

A. Oh, I worked as fireman, engineer, motorman helper.

Q. During your experience of twenty-seven years with this railroad have you ridden in engines and operated engines over and through the various yards of the railroad?

A. I have.

Q. And have you operated in the East Peoria yards?

A. Yes, sir.

Q. And in your experience have you observed the practices and customs of switching?

A. I have.

Q. Are you familiar with the transportation rules of the company that have been introduced in evidence?

A. Yes, sir.

348 Q. And are you familiar with rules 30 and 32?

A. I am.

Q. Were you instructed by anyone with reference to the meaning and interpretation of those rules as they applied to switching in the East Peoria yards?

A. I have.

Q. What were the instructions you received?

A. Received in 1930 by our superintendent that the bell—it wasn't necessary to ring the bell in the yards over there only when people was about the track, people working around the track, in case there would be no accident.

Q. Did you receive any instructions with reference to the interpretation of these rules as applied to those yards which required ringing of bells on locomotives to warn members of switching crews on that particular engine?

A. Never had.

Q. What was the instruction you received, if any, with reference to ringing bells to warn members of the switching crew?

A. I never received no instruction to ring the bell warning the switching crew.

Q. Under the instructions that you received, on what occasions was the bell to be rung by engines switching in the East Peoria yards?

A. In case anybody is in danger of getting hurt or injured close to the track, or walking across the track, any person.

Q. Was that somebody that the engineer or the fireman could see were in a position of danger?

A. Sure.

Q. Was the rule invoked to require ringing of bells 319 when the engineer or fireman didn't see anybody was in a position of that kind?

A. No, sir.

Q. It has been testified here that it was the practice over in the East Peoria yards that the engineer must never move his engine unless he knows where all the members of his crew are. Do you know of any such rule as that, or practice?

A. I do not.

Q. What is the practice about that?

A. Well, you move when you get a sign. A lot of times the field man will be out of sight, and sometimes the pin-puller will be out of sight, but as soon as he gives you a sign you move.

Q. The mere fact that the engineer or fireman can't see all the members of the crew, then, doesn't stop the engineer from moving his engine?

A. Not if he got a sign.

Q. You were the fireman on Diesel engine 200?

A. Motorman helper.

Q. Motorman helper on Diesel engine 200 on the crew on which Tennant worked on the night of July 12, 1940, were you not?

A. I was.

Q. That same crew had been together quite sometime, hadn't it?

A. Well, I can't recollect exactly how long Tennant worked with the crew. He was there two different times I know of.

Q. And was one of the routine jobs of your crew to go in on track B-28 and get the cars that were there, and take them over to the repair track?

A. It was.

Q. And did your engine go into that track that 320 night for that purpose?

A. It did.

Q. And when it did, you were acting as motorman helper, were you?

A. Yes, sir.

Q. Where were you sitting in the cab?

A. On my side.
Q. Which side?
A. Left side, on the seat I got there.
Q. Which direction was the engine headed that night?
A. The engine was headed south.
Q. So that put you on the river or east side?
A. Yes, sir.
Q. And just before going into B-28 you had been performing some switching on some tracks to the east of there, had you not?
A. I presume, yes.
Q. And then the engine headed over toward track B-28, did you?
A. Yes, sir.
Q. Do you know where Tennant was at that time in going over there?
A. No, sir.
Q. You didn't see him on the front footboard?
A. No, sir.
Q. Was that because he was standing over on the right side? Right footboard?
A. I would see him if he was on my side, but I didn't see him at all.
Q. You don't know of your own knowledge he was over there?
A. No, I don't know.
Q. Do you remember going into track B-28 from the lead that night? You remember you did go into track B-28?
321 A. Yes, sir.
Q. Do you remember about how far in the first car was on the track?
A. Oh, it wasn't very far on the other side of the switch. I don't know exactly how far it was.
Q. Well, was it about a car length, as far as you know?
A. Well, probably, yes.
Q. And do you know whether the engine coupled onto that car?
A. I do.
Q. Do you know who made the coupling?
A. No.
Q. You were sitting on the other side from the side on which the signals were being given?
A. Yes, sir.

Q. You couldn't see any of the signals, could you?

A. No, sir.

Q. Do you know whether the engine proceeded to make several couplings on that track that night to get a bunch of cars together?

A. We probably did; two or three, I think.

Q. And the engine would move forward, and then it would back up and take the slack, and then it would go in again, and finally there was a push of four or five car lengths to get the last bunch of cars together, was there not?

A. Yes, there was a space there, but I don't know how much.

Q. But all the signals were being given from the other side?

A. They were.

Q. The other members of the crew were on the west, or other, side of the train from you?

A. Supposed to be.

Q. Did you keep a lookout all the time that coupling 322 operation was going on?

A. With anything moves, I look the way the engine is going to move. If it is going to back, I look back, and if it is going to go ahead, I look ahead.

Q. After the cars were all coupled together, do you know whether or not there was some wait or some delay before it pulled out?

A. I don't remember that.

Q. You don't remember that?

A. No.

Q. Well, if there was a delay, would you have been looking out the window all the time?

A. Not necessarily, with the engine not moving.

Q. You didn't see Tennant walk around on your side of the train, did you?

A. No, sir.

Q. While the train was standing there?

A. No, sir.

Q. But you weren't looking all the time?

A. Not all the time.

Q. Do you remember when the engine finally started off in reverse pulling the cars out of the track that night?

A. Yes, sir.

Q. Were you keeping a lookout then?

A. I was.

Q. You didn't see the signal given to England, did you?

A. No, sir.

Q. Now, was the engine bell ringing as you started to move back out onto the lead?

A. No, sir.

323 Q. Was there anything unusual about that?

A. Nothing at all.

Q. Did you see Tennant—

A. No, sir.

Q. —as the train started to move out?

A. No, sir.

Q. But you were keeping a lookout?

A. From my side, yes, sir.

Q. Do you know how Tennant was killed?

A. No, sir.

Q. Did you hear any shouts or outcries of any kind?

A. I did not.

Q. Was there any rough or unusual start—

A. There was not.

Q. —in starting that train? Were the locomotive lights burning?

A. They were.

Q. Were they burning when you went into the track?

A. Yes, sir.

Q. Were they burning all the time you were in on track B-28?

A. Yes, sir.

Q. And were they burning when you came out?

A. Yes, sir, they was.

Mr. Horton: That's all.

Cross-Examination by Mr. Eagleton.

Q. Mr. Cole, as I understand it, you were keeping a lookout from your side of the train—

A. Yes, sir.

Q. —from the time you went in on B-28 until you
324 come out? That's right, isn't it?

A. When the engine isn't moving probably you will have something else to do. You don't look out all the time when the engine is not in motion.

Q. I will ask you if Mr. Horton asked you these ques-

tions about that matter— Your deposition was taken, too, wasn't it?

A. Yes, sir.

Q. This is page 59:

"When your engine went into B-28 that night, it was headed south, wasn't it?

"Yes, sir.

"And Engineer England was sitting on the west side of the engine?

"Yes, sir.

"You were sitting on the east side of the engine?

"Yes, sir.

"Were you keeping a lookout on the east side?

"Certainly.

"Was your window open?

"Yes, sir.

"And you were leaning out, were you?

"Yes, sir.

"And you were sitting so you could look toward the south, were you?

"So I could look either way most generally, just glance one way or the other."

Do you remember that?

A. Yes, sir.

Q. That is what you were doing?

A. Yes, sir.

325 Q. You were asked about that later, on page 64. This is after your cars had been coupled up and there was some wait:

"There was some wait, was there?

"Yes, sir.

"And at that time you were sitting on the east side of the engine keeping a lookout?

"Yes, sir.

"State whether at any time while you were sitting there, and after the cars had been pushed together, you saw Tennant on your side of the engine.

"Never did.

"And he never walked down past you?

"No."

That's correct, isn't it?

A. Yes, sir.

Q. And that was correct at the time your deposition

was taken? Then and now? Those answers are correct and true?

A. Yes.

Q. With reference to this rule, Mr. Cole, did you know there was a rule 30 at the time your deposition was taken?

A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. Refreshing your recollection, on page 56 of your deposition, question 30—

Mr. Horton: I was the one that didn't know about the rules!

Q. This is the deposition of Mr. Cole. This question, question 30: "Is there a rule of your company that 326 requires an engine bell to be rung when the engine is about to move?

"A. It's not practiced any.

"Q. You don't know whether it is in the rule book or not?

"A. No, sir."

Was that your answer to that question?

A. I know that rule has been in there for a long while.

Q. Do you believe that this answer to this question in your deposition is correct as I read it to you now, and did you make that answer to that question?

A. Well, I might have made that answer, but it's not proper.

Q. Not proper?

A. No, sir.

Q. In other words, you don't deny the answer as having been made—

A. It's not proper.

Q. You say there was a rule book?

A. Yes.

Q. And you don't deny you made that answer in that way?

A. If it's in there.

Q. Mr. Horton said he was the one that didn't know about the rule. Would the fact he didn't know about the rule—was that reflected to you in any way that you didn't know about it?

A. No.

Q. Did you say now, Mr. Cole, so I can get it clear, that

the superintendent at sometime prior to 1940, July 12, 1940, did explain the working of rule 30 to you?

A. Not to me individually, but to the class.

Q. To the class?

A. Yes, sir.

Q. He did explain it?

327 A. Yes, sir.

Q. See if this refreshes your recollection as to that matter on page 69 of your deposition, question 11:

"Did anybody ever tell you that, the superintendent who sits here at this deposition—"

That was Mr. Umshler, this gentleman (indicating)?

A. Our superintendent, yes.

Q. He was at the deposition, too, wasn't he?

A. I believe he was.

Q. I will read you that question:

"Did anybody ever tell you that, the superintendent who sits here at this deposition, or any other superintendent or any other superior,—ever tell you or explain to you with reference to that rule; that it only pertained to track men and other people not members of the crew?

"No.

"No one ever told you that, did they?

"No."

No one ever did tell you that, did they?

A. No, sir.

Q. They never limited the application of the rule to any particular kind of a man, did they?

A. The book of rules, if the switchman lives up to the book of rules there won't be any trouble. They are not going to take any chances any time.

Mr. Eagleton: I move the answer be stricken as not responsive.

The Court: Read the question.

(Question read by reporter.)

328. The Court: Answer that "yes" or "no" if you know.

A. No.

Q. They did tell you at all times to obey the written rules of the company, didn't they?

A. Yes, sir.

Q. You stated, I believe, you have seen some of the crews ringing bells when the engines are about to start, haven't you?

A. Sure, I have.

Q. I mean that happens frequently.

A. Whenever there is anybody around that is in danger it does.

Q. Did you, each time you saw an engine about to start and heard the bell rung—did you each time, with reference to another crew, look to see who was in danger, or if there was anybody in danger?

A. Not at all times.

Q. All you heard was the bell?

A. Yes.

Q. And knew the engine was about to start, is that right?

A. Sure. If the bell rings, then the engine is going to start.

Q. After the bell rings and the engine starts on these occasions you have stated, the engine did start, didn't it? Isn't that right?

A. Yes, the engine moved.

Q. I am talking about these occasions you observed. With reference to other crews, the first thing you heard was the engine bell ring?

A. I have heard the engine bell ring, and then move without ringing it.

Q. Both ways?

329 A. Yes.

Q. I am talking about those that ring it. Those that ring it in the East Peoria yards, the switching yards I am talking about, you first heard the bell ring and knew the engine was about to start?

A. Certainly; a warning.

Q. And you did see the engine start?

A. Yes.

Q. It happened frequently in that yard?

A. It happens whenever anybody is around working and would get hurt.

Q. It is a warning?

A. Yes, sir, to anybody around the yards.

Mr. Eagleton: That's all.

Redirect Examination by Mr. Horton.

Q. Mr. Eagleton asked you if this question was asked you on the deposition:

"Did anybody ever tell you that, the superintendent who sits here at this deposition, or any other superintendent or any other superior,—ever tell you or explain to you with reference to that rule, that it only pertained to track men and other people not members of the crew?"

And you answered "No." You meant by that, didn't you, that these rules on ringing bells would apply to any person—

A. Any person.

Q. —whom the engineer knew to be in a position of danger?

A. That's exactly it; a warning for them.

Q. In other words, if a member of the crew was known by the engineer to be standing in a position of danger
330 and oblivious to the movement of the train, he would ring the bell?

A. Yes. Sometimes they sit on the footboard and they ring the bell to get them off.

Q. But the bell would not be rung for a member of the crew that knew all about the movement,—

A. Certainly not.

Q. —and whom the engineer did not know was in danger?

A. That's right.

Q. On this other question, when you were asked, "Is there a rule of your company that requires an engine bell to be rung when the engine is about to move?" and you said, "It's not practiced any", state whether or not you meant by that that there are no rules of this company that require engine bells to be rung every time the engine is about to be moved. Is that what you meant?

Mr. Eagleton: I object to that.

The Court: What's the objection?

Mr. Eagleton: He is asking now if there are any rules of the company.

Mr. Horton: I am asking what he meant.

The Court: I think he has a right to explain his statement, what he believed the rule to be when he made the statement, if you are offering it for impeachment, and I take it you are.

A. The way I understand the rule, if there is anybody near the tracks or near the right-of-way or approaching the crossing, or road crossing or state crossing, the bell must be rung, if you see anybody that is liable to be hurt or injured there.

Q. When you can see them?

A. Yes, sir.

331 Q. But you don't ring the bell for somebody you don't see, do you?

A. No, sir.

Q. And there is no rule that requires— There is no rule of this company that requires a bell to be rung every time an engine moves?

A. No, sir.

Mr. Eagleton: I object.

The Court: Objection sustained; a question for the jury.

Q. I will ask you if that was your intention when you answered Mr. Eagleton's question on this deposition that there is no rule, of course, requiring the ringing of a bell every time an engine is to be moved?

A. That is the way I understood them. That is the rules that was explained to me or the class.

Mr. Horton: That's all.

Mr. Eagleton: That's all.

332 CHARLES W. BONNER, called on behalf of the defendant, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Horton.

Q. State your name and address.

A. Charles W. Bonner, 911 Third, Peoria, Illinois.

Q. What position do you have with the company?

A. Switchman.

Q. And how long have you acted as a switchman for the company?

A. Approximately six years.

Q. Have you switched in the various portions of the property of the Peoria and Pekin Union Railway Company?

A. Yes, sir.

Q. Have you switched in the East Peoria yards?

A. Yes, sir.

Q. During your experience, have you observed the customs and practices of switching in the East Peoria yards?

A. Yes, sir.

Q. And have you observed how other switching crews and other engineers perform in those yards?

A. Yes, sir.

Q. It was testified by one witness for the plaintiff, Harkless, that a practice exists in the East Peoria yards that an engineer who has received a signal to move his engine can not move his engine unless he knows where all the members of the crew are. Do you know of any such practice?

A. No, sir.

Q. What is the practice that's followed?

333 A. When he gets a proper sign to proceed in either direction, he proceeds.

Q. He proceeds, does he, even though he can't see where all the members of his crew may be?

A. Yes, sir.

Q. Has that practice been followed ever since you have been a switchman?

A. Yes, sir.

Q. Are you familiar with the transportation rules of the company?

A. Yes, sir.

Q. Familiar with rules 30 and 32?

A. Yes, sir.

Q. Have you been instructed with reference to those rules?

A. Yes, sir.

Q. Who by?

A. Mr. Keeler examined me the middle of November, 1939.

Q. What instructions did Mr. Keeler give you about those two rules?

A. Well, I can't truthfully say that they were pointed out to any great extent, but the whole rule book was examined on so far as the switching rules. We didn't have any train orders. We are not concerned with them, don't handle them.

Q. Were those rules touched on by Mr. Keeler?

A. Touched all the rules.

Q. Do you remember now what he told you about those rules and how they were to be applied as to switching operations in the East Peoria yards?

A. I just don't recall now just what instructions he issued.

Q. Have you talked to other people about these rules?

A. Oh, many times.

334 Q. Have you talked to your foreman about the rules from time to time?

A. Yes, we have discussed them.

Q. Have you talked to engineers about them?

A. Yes.

Q. Have you found out from them what the instructions are with reference to the rules?

A. Yes, sir.

Q. What is your understanding of the meaning of those two rules in accordance with the instructions relating to them as you have ascertained the instructions?

Mr. Eagleton: I object to that; incompetent.

The Court: I think he may answer.

A. Read the question again.

(Question read by reporter.)

A. That it's all right for the engine to move, engine man to move his engine after he gets a signal in either direction without ringing the bell in the yard on a straight track, but must be rung as a warning in approaching road crossings and anyone on or about the track who wouldn't be aware of the approach of the engine.

Q. On the morning of July 12, 1940, were you a member of the switching crew with which Tennant was also a member?

A. Yes, sir.

Q. You had been a member of that crew for some time, had you not?

A. Off and on, yes, sir.

Q. About how long had you been working with that crew?

A. About a week at this particular time. I had been on the job at different times before, various different times.

Q. That was the East Peoria industry job, was it not?

335 A. Yes, sir.

Q. They had certain routine jobs to perform every night?

A. Yes.

Q. What was the regular time for the starting of that trick?

A. 11 o'clock at night.

Q. When did you go off duty?

A. 7 o'clock in the morning.

Q. One of the jobs of that crew was to take industrial cars over to Caterpillar Tractor and some of the other plants along there, was it not?

A. Yes.

Q. Another routine job was to take cars that had been collected in B yard over to the T. P. & W.?

A. Yes, sir.

Q. And make an interchange?

A. Yes, sir.

Q. And one of the jobs of that crew was to take the cars that had been accumulating on track B-28 and pull them onto the lead and take them into the "rip" or hammer track?

A. Yes, sir.

Q. Was that job done night after night?

A. Hardly without exception.

Q. Was there anything unusual or difficult about that kind of a switching operation?

A. No, sir.

Q. Was it always handled in virtually the same manner?

A. Yes, sir.

Q. On the night in question, I believe the testimony is there had been some switching going on by your crew 336 on some tracks that were to the east of B-28.

A. Yes, sir.

Q. And that was finished? What, if anything, did Foreman Harkless say with reference to what the next movement would be?

A. Take B-28 over to the hammer track and spread it.

Q. And was Tennant there at the time Harkless said that?

A. Yes, sir.

Q. You were all standing together?

A. Well, on the footboards.

Q. You were on the footboard?

A. I was on one side and then two were on the other. We weren't all standing together. We were all in the same place.

Q. But Harkless told you the next movement would be to go over to B-28 and spread the cars?

A. Yes, sir.

Q. After he said that what, if anything, did you and Harkless do?

A. Dropped off and crossed on over the rails, and started back toward the hind end of the track.

Q. You started to walk over to track B-28?

A. Yes.

Q. What did Tennant do? Did he stay on the engine?

A. He stayed on the footboard.

Q. That was the front footboard of what engine?

A. 200.

Q. Diesel engine 200?

A. Diesel 200.

Q. And that engine was pointed in a southerly direction? The head of it was to the south?

A. The head end was toward the south, yes, sir.

337 Q. That was the end Tennant was riding on?

A. Yes.

Q. That engine had to back down onto the 20 lead, didn't it?

A. Back down over the 28 switch.

Q. And then reverse and move forward over the 28 switch, and then it had to go over the divide 28 switch, did it not?

A. Yes, sir.

Q. And then into track B-28?

A. Yes, sir.

Q. Where were you standing when that engine came in?

A. Second car.

Q. Standing by the second car?

A. Yes.

Q. Where was Harkless?

A. He was walking on back toward the hind end, the chances are a couple of car lengths farther on.

Q. How far was the first car in from the switch point of divide 28 switch?

A. About a car length.

Q. Did the engine make a coupling onto the first car?

A. Yes, sir.

Q. Who made that coupling?

A. Tennant.

Q. You didn't make it yourself?

A. No, sir.
Q. What did the engine do?
A. After it made the coupling? Stopped.
Q. And state whether or not you gave the engineer any signal following that.
338. A. I did after I saw Harkless in the clear and he was all right. He made the joint and stuck his head out the side.
Q. Was he still on the footboard?
A. Still on the footboard, yes, sir.
Q. And you turned around toward the engine and you saw Tennant standing there?
A. Yes, sir.
Q. Still on the front footboard of the engine?
A. Yes, sir.
Q. After the coupling had been made?
A. Yes, sir.
Q. What signal did you give then?
A. The back-up signal.
Q. What did you give that signal for?
A. To make a gap between the cars and make the knuckle; make the joint.
Q. What cars were those?
A. Between the second and third car from the engine.
Q. Tennant wasn't down there where you were, was he?
A. No, sir.
Q. When the engine reversed on your signal, it pulled apart between the second and third cars, did it?
A. Yes, sir.
Q. How far back did it go on your signal?
A. Oh, six or seven feet.
Q. Then did you stop it?
A. Yes.
Q. With a signal?
A. Stop sign.
339 Q. This was dark, wasn't it?
A. Yes, sir.
Q. You were using lanterns?
A. Yes, sir.
Q. And after you had stopped the engine, then what did you do?
A. Reached in and opened the knuckle, and gave him a sign to come ahead.
Q. Then you stepped from between the cars and gave a come ahead signal?

A. Yes, sir.
Q. The engine then did what.
A. Came ahead, and on the stop sign stopped and made the joint.
Q. Did it make the coupling between the second and third cars?
A. Yes, the coupling was made.
Q. Then what did you do?
A. Walked farther down the track.
Q. How far did you walk?
A. Oh, seven car lengths further.
Q. Until you came to what point?
A. The end of the cars we had hold of.
Q. About how many cars did you have hold of at that time?
A. Around nine.
Q. Those cars were all together, were they?
A. Yes, sir.
Q. And were there any more cars on track B-28?
A. Yes, sir.
Q. They were further on south? Down further on the track?
A. Yes, sir.
Q. Did you give any signal to the engineer?
340 A. After I got down to the hind end and opened up a knuckle on that car, then I gave another proceed sign.
Q. When you did that, you looked back toward the engineer, did you?
A. Yes, sir.
Q. Did you see Tennant any place?
A. No, sir.
Q. He had a lantern, didn't he?
A. Yes.
Q. But he wasn't visible?
A. No.
Q. And you gave a proceed signal to the engineer, and did he obey it?
A. Yes, sir.
Q. And continued showing on down the track, did he?
A. Yes, sir.
Q. Until when?
A. Until I gave him the stop sign and made the cars coupled onto the rest of the cars.

Q. After he made that coupling, what did you do? Stop him?

A. I gave him the stop sign.

Q. Do you remember whether you gave a reverse signal for slacking?

A. I didn't just then, no.

Q. What other duties did you have, in addition to coupling those cars?

A. Releasing hand brakes.

Q. Did that mean you would have to climb up on cars?

A. Yes.

Q. Do you remember how many brakes you released?

A. Three.

341 Q. What was Harkless doing all this time?

A. Taking a check of the cut.

Q. You mean by that he was marking cars?

A. Yes, he did mark them. He had a list, and would mark on the list what tracks they were going on.

Q. After all the cars were together and after you had released all the hand brakes, what did you do?

A. Walked to the hind end and stretched them out again.

Q. Was Harkless down there?

A. He wasn't back there quite yet, I don't believe.

Q. You waited for him to come down there? You stood there at the hind end of the cut?

A. When I was letting the brakes off he went to the hind end.

Q. After you had finished letting the brakes off and the cut was all together,—

A. Yes, sir.

Q. —where did you go?

A. To the hind end.

Q. And you waited for Harkless?

A. He was already there.

Q. Did you look up toward the engineer?

A. Yes.

Q. Did you see anything of Tennant?

A. No.

Q. See his light?

A. No.

Q. Where did you think he was?

Mr. Eagleton: I object to that.

The Court: Sustained.

342 Q. Do you know what Tennant's duties were?

A. Yes.

Q. What were Tennant's duties after he made that first coupling?

A. Stay near the head end.

Q. And do what?

A. Attend to the switches and protect the cut, engine.

Q. Did he have any duties to perform with reference to his own safety?

A. Certainly.

Q. What were they?

A. To take care of himself.

Q. Was there any necessity for him to relay any signals which might be given—

A. Not in this instance.

Q. —by Harkless or yourself?

A. Not in this particular work.

Q. Why not?

A. Straight track.

Q. You mean on straight track where it is possible for the foreman to signal directly to the engineer, where the engineer can see him, there is no necessity for relaying through the pin puller?

A. Not where the vision is not obstructed.

Q. Is the practice not to relay through the pin puller?

A. Some fellows do, and some fellows don't.

Q. On this particular night?

A. Harkless didn't usually relay signs on straight track. He didn't do that.

Q. That train had to go out of that track first through the B-28 divide switch, didn't it?

343 A. Yes.

Q. And then it had to go through another switch called "B-28 switch"?

A. Yes.

Q. That got it onto the middle lead, did it not?

A. Yes, sir.

Q. Then the engine had—train had to go clear down past the B-41 switch, did it not,—

A. Yes, sir.

Q. —in connection with this movement? And it had to keep on going through the puzzle switch?

A. Diamond.

Q. The diamond switch which is to the north of B-41

switch, and keep going far enough to the north so that the rear end of the cut would clear 41 switch?

A. Get over the switch.

Q. And somebody had to see all those switches were lined?

A. Yes, sir.

Q. Was that the duty of the pin puller?

A. Yes, sir.

Q. When he went out of sight, that was where he would ordinarily go, was it?

A. Well, that I couldn't say. I don't know where he would ordinarily go because I would be taking care of my business and tying into this cut.

Q. You were usually working down along the length of cars, and not paying any attention to where Tennant went? You were performing your duties, is that right?

A. Yes, sir.

344 Q. And assumed he was performing his?

A. Yes, sir.

Q. After these cars were all together on track B-28, and after Harkless had finished checking the cars, did you see Harkless give a signal to the engineer?

A. Yes, sir.

Q. What kind of a signal was it?

A. Back-up signal.

Q. Did the engineer obey it?

A. Yes, sir.

Q. Was Tennant in sight when this signal was given?

A. No, sir.

Q. And the train started to move, did it?

A. Yes, sir.

Q. Did you ride on the cars?

A. About four or five car lengths.

Q. Which car did you ride on?

A. I believe it was the second car from the hind end.

Q. Did you continue to ride on the car, or get off?

A. I got off.

Q. Why did you get off?

A. To cross through the yard to the G yard, repair track, and line switches.

Q. You got off so you could walk on foot and cut across the yard to where this cut would return to it.—

A. Yes, sir, that's right.

Q. —is that it?

A. Yes, sir.

Q. Do you know how Harold Tennant was killed?

345 A. No, sir.

Q. You didn't see it, did you?

A. No.

Mr. Horton: You may cross-examine.

Cross-Examination by Mr. Eagleton.

Q. Mr. Bonner, the place where your engine stopped that night as it went south on B-28, after your whole train had been coupled together and completed its couplings before Harkless gave the reverse movement—

Mr. Horton: I have a couple more questions.

Mr. Eagleton: I will withdraw the question.

Direct Examination Continued by Mr. Horton:

Q. After Harkless gave the signal to the engineer to reverse and the train started to move, was there any unusual jerk or bump or anything about it?

A. No, not noticeable on the hind end.

Q. Was this whole operation as you have described it, was it done as was usually done on previous nights?

A. Yes, sir.

Q. Was this whole switching operation conducted in the usual and customary manner?

A. Yes, sir.

Mr. Horton: That's all.

346 *Cross-Examination by Mr. Eagleton.*

Q. Mr. Bonner, you saw where the lantern, cap and hand were after they were discovered?

A. Yes, sir.

Q. And that is approximately where the front end, or south end, of your engine had stopped at the time the last coupling motion was completed, wasn't it?

A. As near as I can tell, it was.

Q. At any rate, from that time on when your coupling was completed, the only signal that was given thereafter was the one that moved it out to the north?

A. I stretched the whole cut out myself after letting the brakes off.

Q. You mean took the slack out?

A. Yes, sir.

Q. Ready to go? When your engine got through with the work on B-28, its front end or south end was about approximately at the place where the lantern, cap and hand were found, right hand, isn't that right?

A. Approximately, yes, as near as I can tell.

Q. When you released these hand brakes you were speaking of, there is usually a brake platform on the end of a car; if it is a box car, the brake platform sits down about two feet below the top of the car, two or two and a half feet?

A. I don't know, but that's about it.

Q. And, in order to get to the brake platform, you usually use, and did use on this occasion, what you call the "end ladder"?

A. Incidentally, there wasn't a brake on a box car. 347 I had a tank and a coal car and a load of poles.

Q. Even though you were dealing with a tank and a coal car, your brakes were at the end of the car? Whatever car it is on?

A. Yes.

Q. That is where you went on these three different occasions to release your brakes, is that right?

A. Yes.

Q. And doing that, of course that was while Harkless was walking on down the line ahead of you?

A. That's right.

Q. And that is a customary duty that a foreman performs?

A. Yes, sir.

Q. With reference to the work that Tennant was doing, whether he would ordinarily ride up on the footboard to this 41 switch, or ride up on the cab of the engine, or ride on the side of some car to get to that point you don't know, do you?

A. No, I don't.

Q. You have seen it done all three ways, have you?

A. Yes.

Q. As a matter of fact, in order to get out properly and go north to the place you desired to go, Tennant only had to line one switch, did he not?

A. This particular night?

Q. That's right.

A. He didn't have any switches to line.

Q. He didn't have any to line?
A. No.
Q. You considered Tennant, from your observation of him, a very careful man, did you not?
348 A. Yes, sir.
Q. You were next in line, I believe, next underneath him in seniority?
A. I followed him on the board, yes, sir.
Q. What does that mean?
A. One number older than I am. I was the youngest man holding a regular job, and he was second youngest.
Q. So you were under him in seniority?
A. Yes.
Q. And, by virtue of his death, you moved into his place?
A. Yes, sir.
Q. You are still working for the company?
A. Yes, sir.
Q. And have been ever since?
A. Yes, sir.
Q. And all the switchmen, according to the contract under which they work with the company, are called for work on a seniority basis?
A. That's correct.
Q. Has the work since July 12, 1940, been steady?
A. It has for me.
Q. What is your basic day pay at the present time?
A. Eight hours, $7.82.
Q. I believe at the time of this accident it was $7.06?
A. It was then. That was before the increase.
Mr. Eagleton: I think that's all.
The Court: Is that all with this witness?

349 *Redirect Examination by Mr. Horton.*

Q. If Tennant had lived he would not necessarily have worked on the same tricks you have been working on, would he?
A. No, sir.
Q. Did Tennant work as frequently as you did when he was living?
A. He was a steady worker.
Q. But you did not always work on the same tricks, did you?
A. No, sir.

Q. You had different preferences, did you?

A. Most of the time when we worked it was on the extra board. We had to take what we could get.

Q. So the work you have done up to the present time would not necessarily have been the work Tennant would have done?

A. No.

Mr. Horton: That's all.

The Court: Is that all with this witness?

Mr. Eagleton: That's all.

Trial Adjourned at 4:45 o'clock P. M.

350 May 7, 1942.

Trial Resumed at 9:30 o'clock A. M.

Appearances:

Same as before.

Mr. Horton: At this time, Your Honor, I want to read in the record certain agreed facts with reference to the plaintiff's service record and the wages that he received from this company.

The Court: Any objection?

Mr. Eagleton: No, Your Honor.

The Court: You may proceed.

Mr. Horton: On April 14, 1942, there was filed in this court defendant's Request for Admission of Facts under the Rules of Civil Practice, and under date of April 13, 1942, all these facts were admitted by the plaintiff.

"Now comes the defendant and requests the plaintiff to admit the truth of the following relevant matters necessary in the defense of the case:

"1. Harold C. Tennant was born June 21, 1906.

"2. Harold C. Tennant was first employed as a switchman by defendant on August 1, 1936. On June 14, 1937 he was cut off board account slack business. On June 20, 1937 he obtained employment in the Engineering Department of defendant, resigning four days later. On August 23, 1937 he resumed service as switchman for defendant. On March 11, 1938 he was granted thirty days leave of
351 absence. On April 14, 1938 he was furloughed account slack business. On August 30, 1938 he resumed service as switchman for defendant. On June 1, 1939 he was

furloughed on account of slack business. On September 13, 1939 he resumed service as switchman, in which service he continued until his death on July 12, 1940.

"3. The following is a statement showing the gross earnings, deductions and net earnings for Harold C. Tennant, while an employee of Peoria and Pekin Union Railway Company, for the period of three years prior to his death, together with the averages per year:"

I won't read the gross earnings and deductions, but only the net earnings.

"1937

August	$ 53.52
September	162.97
October	214.89
November	203.42
December	173.91

1938

January	72.09
February	41.73
March	Nothing
April	Nothing
May	Nothing
June	Nothing
July	Nothing
August	Nothing
September	154.82
October	198.17
November	173.37
December	185.38

1939

January	137.11
February	177.45
March	137.54
April	136.47
May	21.35
June	Nothing
July	Nothing
August	Nothing
September	129.40
October	240.23
November	179.16
December	111.36

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1940	
January	215.95
February	168.54
March	197.86
April	183.73
May	119.10
June	166.82
July	64.52,"

and there is a recitation that deductions from wages were in accordance with the provisions of the Carriers Taxing Act effective January 1, 1937.

The average per year net earnings for the three year period was $1,340.28.

Defendant rests, Your Honor.

The Court: Anything in rebuttal?

Mr. Eagleton: Mr. Harkless, please.

353 Whereupon, the plaintiff, to maintain the issues in her behalf, offered the following evidence in rebuttal, viz.:

SHELDON MORRIS HARKLESS, having been previously sworn, resumed the stand and testified in rebuttal as follows, in answer to

Direct Examination by Mr. Eagleton.

Q. Mr. Harkless, I want to ask you one or two questions, please. With reference to the head man, such as Tennant in this particular case, there has been some testimony given on behalf of the defense with reference to the movements that were to be made on a track such as B-28, and his knowledge of said movements or the reason for knowledge. I will ask you, in that connection, if it is possible for a head man, such as Tennant, when you go in on a track like B-28, to know, or to have any way of knowing, how many different moves you are going to make in order to couple up your track, or how much time it is going to take to do the job?

Mr. Horton: I object: improper rebuttal.

The Court: I don't understand it rebuts anything.

Mr. Eagleton: I don't think it rebuts any specific statement, Your Honor, but they asked if he should have knowledge of what would take place and they answered

yes, and I am going to show he wouldn't have knowledge of the movements or time it would consume.

354 The Court: I think we would generally concede that to be true. Objection sustained.

Q. I will ask you with reference—It was testified by the engineer that he ordinarily (this man Tennant) in line with his duties would go ahead of the engine up to this particular switch which would lead through 41, the track into which you were going next. I will ask you if that is a fact, if the man would go ahead of the engine, or he would at all times remain with or follow the engine.

Mr. Horton: Same objection.

The Court: I think he may answer that.

A. Well, he wouldn't go ahead of the engine.

Q. What reason is there for not going ahead of the engine?

Mr. Horton: Your Honor, I don't think they should be permitted to put this man on for all purposes.

The Court: No. Objection sustained as to that.

(Following offer out of the hearing of the jury:

Mr. Eagleton: I offer to prove by the witness, if permitted to answer, that the reason why Mr. Tennant would not go ahead of the engine was because he would have to stay with the engine and the cars immediately attached to it at the head end so that, in the event any of the cars were detached or any brake was found to be on or which would be off or any brake shoes binding, or any other matter of that type, were noticed by him it would be his duty to see that those conditions were remedied, or to be in a position to notify the foreman at the rear end of those conditions before the cut would pull

355 out.

Mr. Horton: I object to this offer of testimony on the ground that it appears that it is evidence which might have been introduced in evidence in chief for the plaintiff, and is at this stage of the trial improper rebuttal evidence.

The Court: I think I am going to let him answer.)

The Court: The objection is overruled. He may answer. What is the question?

(Question read by reporter.)

A. Well, I always instruct my men, any men, to stay with the engine whether on straight track or on crooked track.

Mr. Horton: I object to that answer.

The Court: Yes, I think the objection will be sustained.
Mr. Eagleton: That may be stricken, yes.
Q. The question is, Why is that necessary?
Mr. Horton: I object as calling for the opinion of the witness, and speculative.
The Court: I think he may answer if he knows.
A. Well, a car could jump the track, a draw bar could pull out,—
The Court: No, the objection will be sustained as to that.
A. —or brake beam—
Mr. Horton: Just a moment!
The Court: Yes, objection sustained.
Mr. Horton: I ask that the answer be stricken.
The Court: It may be stricken.
Q. Without enumerating, Mr. Harkless, the specific 356 items that might occur in the movement of a train of that kind, were there matters of that general type, with reference to brakes and air hoses and other things, that do occur that require the attention of the head man at the front end so that he can be in a position to notify the rear end in the event anything of that kind happens?
Mr. Horton: I object as being leading and speculative, particularly following the ruling of Your Honor.
The Court: Yes, it is leading.
Mr. Eagleton: I think you have to do that to give him the field.
The Court: If you know why this man didn't go to the head of the engine, you may so state.
A. Well, if he went ahead of the engine he would get run over.
The Court: All right!
Mr. Eagleton: That's all, Mr. Harkless.

Cross-Examination by Mr. Horton.

Q. He did get run over, didn't he, Mr. Harkless?
A. Yes, he did get run over.
Mr. Horton: That's all.

Redirect Examination by Mr. Eagleton.

Q. When you say he would get run over, do you mean he would be in a position away from the place where he was instructed to be by you?

357 A. If he went ahead of the engine between the track he would get run over.

Q. He would get run over? When you say that, you don't know he would get run over every time he went ahead of the engine?

A. No, sir.

Mr. Horton: I object.

The Court: Objection sustained.

Mr. Eagleton: I believe that's all.

DAVID CASEY, called in rebuttal on behalf of the plaintiff, and having been first duly sworn, testified as follows, in answer to

Direct Examination by Mr. Eagleton.

Q. Will you please state your name to the court and jury?

A. David Casey.

Q. And what is your occupation or profession?

A. Attorney at law.

Q. And you have been an attorney at law practicing law how long, please?

A. About five years.

Q. Admitted to the bar in the City of St. Louis, State of Missouri?

A. Yes, sir.

Q. And you have been in my employ as a lawyer during that time?

A. Yes, sir.

Q. The biggest part of that time?

A. Yes.

358 Q. Mr. Casey, in line with the investigation of this case on trial, the Tennant case, did you, on August 11, 1941, go to the home of Thomas England here in Peoria, Illinois, at 1317 Western Avenue, it looks like, and take from him this statement which bears his signature on three pages?

A. Yes, sir.

Q. For the purpose of identification, I have had that statement marked "Plaintiff's Exhibit J". I will ask you if the information contained in that statement and written in there in your handwriting was given by Mr. England.

A. Yes, sir, it was.

Q. Did he, after you had written that statement,—did he after that read it over?

A. Yes, sir, he did, and took considerable time doing it, too.

Q. Did he sign it?

A. Yes, sir, he did.

Q. On each page?

A. On each page he signed it with a pencil because I asked him if he wanted to use my pen, and he said, "I can't write very well with a pen. My hand trembles", so he signed it with a pencil. In addition to putting his signature down, he put down he had read it, and it was O. K.

Mr. Eagleton: I offer the statement in evidence.

The Court: It may be considered as offered.

You may cross-examine.

Do I understand you are offering the entire statement?

Mr. Eagleton: Yes, Your Honor.

359 The Court: Or only that part referred to?

Cross-Examination by Mr. Horton.

Q. What did you say your name was?

A. David Casey.

Q. You have a brother, haven't you?

A. Yes.

Q. Is he a lawyer, too?

A. Yes, sir, he is.

Q. Your brother came to Peoria to investigate this case for Mr. England, didn't he?

A. Well, he did a portion of the investigation.

Q. Your brother went to see England, didn't he?

A. No, sir. I believe Mr. England pointed me out today as the man who went to see him and talk to him.

Q. Your signature does not appear on this statement as a witness, does it?

A. No, sir.

Mr. Horton: Well, I object to the statement on the ground that it's incompetent, immaterial and not tending to rebut anything that Mr. England testified to, and not tending to impeach his testimony in any way.

The Court: I don't understand that the entire statement would be competent at all.

Mr. Eagleton: I would like to read that portion of the

statement, and offer it in evidence, that was read to
360 the witness England.

The Court: You are offering that portion only?

Mr. Eagleton: That portion only.

The Court: The objection will be overruled as to that portion.

Mr. Horton: I would like to ask one or two more questions of the witness.

The Court: All right.

Q. When you talked to England, you didn't transcribe what he said in shorthand notes, did you?

A. No, sir, I did not.

Q. You listened to what he said, did you, and then wrote down your version of it in long hand?

A. No, I wrote down his version in longhand.

Q. You did the writing?

A. Yes, sir, I did.

Q. And immediately after you finished the writing did you hand it to him?

A. Yes, sir, I did.

Mr. Horton: All right. That's all.

Redirect Examination by Mr. Eagleton.

Q. I will ask you if at that time he told you, Mr. Casey, this statement that appears on page 2 reading as follows: "It is the usual practice and custom that a train should not be moved while a man is missing. This rule is observed in the Peoria & Pekin yards"?

A. Yes, sir, he did.

361 Q. And is that above his signature on page 2, and above the words "Read" and "O. K."?

A. Yes, sir, just above those words.

Mr. Horton: I want to renew my objection to the admission of even the part of the statement that refers to a man in the crew missing, because Mr. England testified yesterday that when he referred to a man missing from a crew he meant a man that had gone away and left his duties, and no one knew where he was, or had any reason to know where he was.

The Court: That is correct. I think it is a question for the jury. It is only to contradict the evidence of the witness yesterday.

Q. All of this statement is in your own handwriting, in ink, with the exception of the words that appear at the

bottom of each page, "Read" and "O. K.", and his signature?

A. Yes, sir.

Mr. Eagleton: That's all.

The Court: Is that all with this witness?

Call the next.

362 MARY I. REYNOLDS, called in rebuttal on behalf of the plaintiff, and having been first duly sworn, testified as follows, in answer to:

Direct Examination by Mr. Eagleton.

Q. Miss Reynolds, as a witness I desire to ask you whether or not you are the same Miss Reynolds who reported the deposition of the engineer, Thomas England, in the Judge's chambers or in this court building (I think that was the chambers or library, it is called) under date of December 5, 1941, pursuant to notices theretofore given for the taking of the deposition and order of court?

A. I am, yes, sir.

Q. Did you transcribe the answers that were made and the questions that were asked of that witness on that occasion, Miss Reynolds?

A. I did.

Q. Will you turn to page 41 of the deposition, particularly the question marked as question 137 and the answer thereto, and, after looking at that question and answer, state to the court and jury whether or not the witness made that answer to the question there transcribed?

Mr. Horton: I object to that on the ground that that is not the proper way of getting this kind of testimony. It would not be the best evidence. Her stenographic notes of what she took down during the taking of that deposition would be the best evidence, and I object to this method of making this proof.

The Court: What is the question, please?

363 (Question read by reporter.)

The Court: I think she may answer.

A. Yes, sir, I did.

Q. Will you read that question and answer, please?

A. "Redirect Question 137. From your investigation as to where his body was found, would you say that the first— Well, from your investigation as to where his

body was found, and where the light was found and his hand, would you say that the light and the hand were about where your engine had been standing after you had completed shoving the cut?

"Answer Yes."

Q. That question, incidentally, was asked by whom?

Mr. Horton: I object to this method of making this proof, and her notes would be the best evidence. He should ask whether the questions were asked and the answers were given.

The Court: That is the usual way, but I can't see where this wouldn't be all right.

Cross-Examination by Mr. Horton.

Q. Did you check that transcript with your stenographic notes made at the time?

A. I did, yes, sir.

Mr. Eagleton: If the court please, in that respect I am perfectly willing, if the court wants to take the time, Miss Reynolds get her notes. I don't like to delay the trial.

Q. Have you those notes with you?

A. No, sir.

364 The Court: I don't see any necessity unless it is requested by opposing counsel.

Mr. Eagleton: Do you wish her to get her notes, Mr. Horton?

Mr. Horton: No.

Direct Examination Resumed by Mr. Eagleton.

Q. Turning to that same witness's testimony, Miss Reynolds, at page 24, questions 38 and 39,—

A. 238 and 239?

Q. I guess that is 238 and 239. You are right. Would you state whether or not those answers were made to those questions at the same time and place heretofore mentioned?

A. Yes, sir, they were.

Q. Would you mind reading those two questions and answers?

A. "Cross Question 238. Whose duty was it to hold the engine still if a man is or was missing?

"Answer Foreman.

"Cross Question 239. The foreman's duty?

"Answer Yes."

Mr. Eagleton: That's all, Miss Reynolds.

Mr. Horton: I object to the evidence just given by Miss Reynolds, and ask that it be stricken on the ground it tends to prove none of the issues in this case, and it rebuts nothing.

The Court: What does it rebut? That is the thing I am wondering about.

Mr. Eagleton: The witness denied categorically with 365 reference to the answer on 41.

The Court: I can see that is rebuttal.

Mr. Eagleton: And the witness, with reference to 24, would not state whether he did or did not give that answer because he didn't have any recollection.

The Court: Does it rebut anything he said yesterday?

Mr. Eagleton: Yes, he said yesterday it was not the foreman's duty to hold the engine still.

The Court: Objection overruled.

Mr. Eagleton: The plaintiff rests.

The Court: Any further testimony?

The jury may retire for a few minutes.

(Following motion made out of the presence of the jury:

Mr. Horton: Now at the close of all the testimony in the case the defendant offers its formal motion to instruct the jury to find the defendant not guilty.

The Court: Does it have anything additional from your motion filed heretofore?

Mr. Horton: It states the same grounds that I had before and, in addition, says the plaintiff has failed to introduce clear and convincing evidence on the question of pecuniary earnings to submit this case to the jury.

The charges of negligence have not been sustained by any formal proof. I would like to see the proof.

The Court: You may, but our custom, unless there is something vitally different from your original motion, is to take it under advisement and let it go to the jury, 366 and to rule thereafter.

Mr. Horton: There is one question in connection with damages I did want to call to the attention of the court.

It would be impossible for this jury to determine the amount of damages in this case because the court knows that the method of ascertaining damages is to take an amount supposed to be what the beneficiaries might well

reasonably anticipate would be paid to them during the expectancy of this switchman, discounted each year at the usual and customary earning power of money.

There is not one word of testimony in this case as to what the jury should consider as the earning power of money. That was the obligation of the plaintiff, to put in evidence of that kind, and he hasn't done it. How can we turn a jury loose with no evidence on which to properly estimate damages if they decide to assess damages?

The Court: Isn't the assessment of damage a question of instruction?

Mr. Horton: No, there is always evidence in these cases as to what is the usual and customary per cent.

Mr. Eagleton: That is a question for the jury.

Mr. Horton: It is a question for the jury, yes, but on some evidence. There isn't any in the case. The jury wouldn't know what rate.

The Court: I will hear you on that point.

Mr. Horton: You would prefer I not make the
367 argument, and the court will take it under advisement?

The Court: I believe we should take it under advisement.

Mr. Horton: He accused me of using old, moth-eaten cases, and I have some new ones.

The Court: I would be glad to hear you on your motion.

Mr. Horton: I will save my new cases.

The Court: Don't show them to them! Have you prepared instructions in this case on both sides?

Mr. Eagleton: I have, Your Honor.

Mr. Horton: Yes, sir.

The Court: Submit them to one another.)

(Recess.)

The Court: The plaintiff may proceed with the argument. Fifty minutes on each side.

By direction, the following not transcribed:

Closing argument by plaintiff.

Closing argument by defendant.

Instructions.

368 The Court: Let the record show the court gave instructions 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 14, 15 and 17 as offered by the defendant in this case; that the court has refused instructions 7, 8, 13 and 16 of the instructions offered by the defendant in this case largely because of the fact that the court believed they were repetition of in-

structions given; that the court has refused interrogatories numbers 1, 2, 3, 4, 5, 6, 7 and 8, the court believing that such interrogatories would only be confusing, and that they are covered by the instructions of the court.

Plaintiff's counsel may make any exceptions.

Mr. Horton: Defendant's counsel excepts to the action of the court in not giving the interrogatories offered.

The Court: All right.

Any exceptions on the part of the plaintiff's counsel as to those instructions?

Miss Reporter, let the record show the court has granted instructions A, B, C and D as offered by plaintiff's counsel. Make any exception there.

Mr. Horton: Counsel for defendant objects to the giving of plaintiff's instruction A for the reason that it does not provide for the rule adopted by the federal court in assessing damages in these cases. It does not instruct the jury that the reasonable annual benefits to the beneficiaries are to be discounted by an amount equally the current
369 earning power of money, and, furthermore, it does not advise the jury that they should consider the possibility that the widow might remarry.

Defendant objects to instruction B on the ground that it does not contemplate all the evidence in the case, but singles out and instructs the jury only as to Rule 30, giving the jury the impression that that is the only rule in issue in the case, and, further, that said instruction instructs a verdict for the plaintiff.

The Court: Does that cover all yours?

Mr. Horton: That covers mine.

The Court: Take up your objections.

Mr. Eagleton: The plaintiff excepts to the giving of instruction number 6 because it is in conflict with the defendant's instruction number 9, instruction number 9 limiting the plaintiff to the proof of at least one of the charges made in the petition, whereas the instruction number 6 attempts to cast the burden on plaintiff to prove both charges of negligence.

Plaintiff excepts to the giving of instruction number 10 because it does not require in the instruction, which directs the jury that the plaintiff has failed to sustain this specific charge of negligence, it does not require the jury to find that the practice and custom therein mentioned as having

been adopted by the defendant was a safe practice, or reasonably safe, or was consistent with defendant's duty under the law. It permits the jury to believe that the
370 defendant is entitled to a verdict even though it adopted a negligent practice.

The plaintiff excepts to the giving of instruction number 12 because that instruction attempts to relieve the defendant from liability for at least one charge of negligence based on the question of whether or not the engineer alone failed to perform his duty in discovering the plaintiff's decedent.

Coming back to instruction number 10 again, plaintiff also excepts to the giving of that instruction as given because it requires actual knowledge on the part of the engineer or the servants of the defendant of the discovery of the said Harold C. Tennant in a place of danger when actual knowledge is not required under the law.

No other exceptions!

Endorsed: Filed Sept. 3, 1942, C. W. Schwaner, Clerk.

Filed May 5, 1942

371 And afterwards, to-wit: on the 5th day of May, A. D. 1942, during the trial and at the close of Plaintiff's evidence, there was filed with the clerk of said Court, a certain Motion by Defendant at the close of Plaintiff's Evidence to find defendant Not Guilty, with Instruction attached, which said Motion and Instruction were and are in the words and figures following, to-wit:

372 In the District Court of the United States.

(Caption—P-138)

MOTION.

Now comes the defendant, Peoria and Pekin Union Railway Company, a Corporation, by its attorney, at the close of the Plaintiff's evidence, and moves the Court to instruct the Jury to find the Defendant, Peoria and Pekin Union Railway Company, not guilty, and with this motion tenders to the Court separately and distinctly from any other instruction tendered in the case, a written instruction in the following form:

"The Court instructs the Jury to find the Defendant,

Peoria and Pekin Union Railway Company, a corporation, not guilty",

with the request that the Court mark the instruction "Given" and read the same to the Jury, and for the reasons for said Motion says:

1. The plaintiff has failed to prove the allegations of the Amended Complaint.

2. The plaintiff has failed to prove negligence on the part of the defendant by substantial evidence.

3. The plaintiff has failed to produce substantial affirmative proof that the defendant was negligent, and that such negligence was the proximate cause of the fatal injury.

4. The evidence introduced on behalf of plaintiff leaves the cause of the fatal accident uncertain and conjectural.

373 5. The Court should not allow the issues to go to the Jury since it appears from the evidence that the fatal accident may have occurred in several different ways, and since it is left in doubt and uncertain whether decedent was injured through his own negligence, or as a proximate result of some negligence on the part of defendant.

6. Plaintiff's testimony leaves the cause of the death of decedent uncertain and shows that any one of a number of things may have brought about his injuries, for some of which the employer is not responsible, and it is not for the Jury to guess between these various causes and find that the negligence of the defendant was the real cause of the fatal injuries.

7. Plaintiff has failed to introduce sufficiently clear evidence upon the subject of loss of pecuniary benefits to justify the submission of the question of damages to the Jury.

8. For various other good and sufficient reasons.

Peoria and Pekin Union Railway Company, a Corporation,
Defendant.

By E. E. Horton,
Its Attorney.

374 The Court instructs the Jury to find the Defendant, Peoria and Pekin Union Railway Company, a Corporation, not guilty.

Endorsed: Filed May 5, 1942, G. W. Schwaner, Clerk.

Entered May 5, 1942.

375 And afterwards, to-wit: on the 5th day of May, A. D. 1942, the following further proceedings were had in said court and were entered of record in said cause, to-wit:

376 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—P-133)

Tuesday, May 5, 1942.

Court met pursuant to adjournment.

Present, the Honorable J. Leroy Adair, Judge.

And now on this 5th day of May, A. D. 1942, come again the parties to this cause, and comes also the Jury impaneled and sworn herein and the further trial hereof is resumed. Comes now the plaintiff herein and continues with evidence on her behalf, and at the conclusion of such evidence, the plaintiff rests. Comes now the defendant and moves the court to instruct the Jury to find the defendant not guilty, and the court having heard said motion and being fully advised in the premises, it is ordered by the court that said motion be and it is hereby denied. Comes now the defendant and presents evidence on its behalf, and after hearing a part of said defendant's evidence and the hour for adjournment having arrived, the further trial hereof is postponed until 10 o'clock a. m. tomorrow.

377 And afterwards, to-wit: on the 7th day of May, A. D. 1942, there was filed in the office of the clerk of said court, a certain Motion by Defendant at the close of all the Evidence to find the defendant Not Guilty, which said Motion was and is in the words and figures following, to-wit:

378 IN THE DISTRICT COURT OF THE UNITED STATES. Filed May 7, 1942
(Caption—P-133)

MOTION.

Now comes the defendant, Peoria and Pekin Union Railway Company, a Corporation, by its attorneys, at the close of all the evidence in the case, and moves the Court to instruct the Jury to find the Defendant, Peoria and Pekin Union Railway Company, not guilty, and with this motion tenders to the Court separately and distinctly from any other instruction tendered in the case, a written instruction in the following form:

"The Court instructs the Jury to find the Defendand, Peoria and Pekin Union Railway Company, a Corporation, **not guilty**",

with the request that the Court mark the instruction "Given" and read the same to the Jury, and for reasons for said Motion says:

1. The plaintiff has failed to prove the allegations of the Amended Complaint.

2. The plaintiff has failed to prove negligence on the part of the defendant by substantial evidence.

3. The plaintiff has failed to produce substantial affirmative proof that the defendant was negligent, and that such negligence was the proximate cause of the fatal injury.

4. The evidence introduced on behalf of plaintiff leaves the cause of the fatal accident uncertain and conjectural.

5. The Court should not allow the issues to go to
379 the Jury since it appears from the evidence that the fatal accident may have occurred in several different ways, and since it is left in doubt and uncertain whether decedent was injured through his own negligence, or as a proximate result of some negligence on the part of defendant.

6. The evidence leaves the cause of the death of decedent uncertain and shows that any one of a number of things may have brought about his injuries, for some of which the employer is not responsible, and it is not for the Jury to guess between these various causes and find that the negligence of the defendant was the real cause of the fatal injuries.

7. Plaintiff has failed to introduce sufficiently clear evidence upon the subject of loss of pecuniary benefits to justify the submission of the question of damages to the Jury.

8. From all the evidence in the case the specific charges of negligence contained in the Amended Complaint have not been sustained by any substantial proof.

9. From all the evidence in the case there is an inherent probability that the specific allegations of negligence could be true, and the evidence on these issues are so overwhelmingly in favor of the defendant that the trial court should direct a verdict for the defendant.

10. For various other good and sufficient reasons.

Peoria and Pekin Union Railway Company, a Corporation,
Defendant.
By /s/ E. E. Horton,
Its Attorney.

380 The Court instructs the Jury to find the Defendant, Peoria and Pekin Union Railway Company, a Corporation, not guilty.

Endorsed: Filed May 7, 1942, G. W. Schwaner, Clerk.

Filed May 7, 1942.

381. And afterwards, to-wit: on the 7th day of May, A. D. 1942, there was filed in the office of the clerk of said court, certain written Defendant's Instructions numbered 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 14, 15 and 17 theretofore tendered by said defendant, all of which Instructions were given by the Court; and certain written Plaintiff's Instructions numbered A, B, C and D theretofore tendered by said Plaintiff, all of which were given by the Court; and Defendant's written Interrogatories numbered 1, 2, 3, 4, 5, 6, 7 and 8, which were refused by the Court, said Instructions and Interrogatories being in the words and figures following, to-wit:

382 The Jury are instructed that this case has been brought under the Federal Employers' Liability Act, a statute of the United States relating to personal injuries of railroad employees, and that before plaintiff has a right to recover any damages whatsoever, the Jury must find by the weight of all the evidence in the case that the in-

juries complained of were directly and proximately caused by negligence on the part of the defendant, but if you should find from the weight of all the evidence that the decedent Harold C. Tennant, came to his death as a sole, direct and proximate result of his own carelessness or negligence, then and in such event you must find the defendant not guilty.

383 You are instructed that the Federal Employers' Liability Act does not make the defendant an insurer of the safety of its employees, and the mere fact standing alone that Tennant received injuries while working about the cars of defendant does not make that company liable for damages.

384 The Jury are instructed that while the law permits the plaintiff in the case to testify in her own behalf, nevertheless the Jury have a right in weighing her evidence to determine how much credence to be given to it and to take into consideration that she is the plaintiff and interested in the result of the suit.

385 If the Jury believe from the evidence that any witness in this case has knowingly and willfully sworn falsely, on this trial to any matter material to the issues in the case, then the Jury are at liberty to disregard the entire testimony of such witness except in so far as it has been corroborated by other credible evidence or by facts and circumstances proved on the trial.

386 In weighing the testimony of any witness, the Jury have a right to determine whether the credibility of said witness may be affected by facts showing prejudice, bias or interest, or that said witness may be disgruntled or hostile toward a party in the case.

387 The Jury are instructed that proof of negligence alone on the part of the defendant is not sufficient, and that even if you should find by the greater weight of the evidence that the defendant has been guilty of negligence, yet this does not mean that such negligence was the proximate cause of the alleged injuries to Harold C. Tennant, and that it is also necessary for plaintiff to prove by the greater weight of the evidence that the defendant was guilty of the specific acts of negligence alleged in the Amended Complaint, and that such negligence was the direct and proximate cause of the injuries.

388. You are instructed that the plaintiff has made certain specific charges of negligence against the defend-

ant in the Amended Complaint to the effect that the fatal injuries of Harold C. Tennant on the night of July 12, 1940, were caused by a failure on the part of the defendant's servants to observe a rule of the company alleged to have required the engineer to ring the bell of the locomotive before moving the same, and it is also specifically charged that defendant was guilty of negligence in that said engineer failed to exercise care to discover the whereabouts of Tennant before moving his engine; and you are further instructed that the plaintiff must prove at least one of these charges by the preponderance or greater weight of the evidence, and if you should believe, after hearing all the evidence in the case, that the proof submitted by the plaintiff and the proof submitted by the defendant is of equal weight, or if you should believe that the evidence submitted by the defendant outweighs that of the plaintiff, then you should find the defendant not guilty.

389 You are instructed that one of the specific acts of negligence charged against the defendant in this case was that the defendant, in the operation of its railroad, had promulgated a rule which was in effect on July 12, 1940, as follows:

"30. The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grades, and to prevent accidents.";

and that defendant through its employees negligently and in violation of said rule failed and omitted to ring the engine bell when said engine was about to move, while Harold C. Tennant was working on or about the engine and cars, and you are further instructed that the burden is upon the plaintiff to prove this charge of negligence by the greater weight of evidence in the case, and that if you should find by the preponderance of evidence that another rule of the defendant was in effect at the same time, as follows:

"32. The unnecessary use of either the whistle or the bell is prohibited.";

and if you should believe by the weight of the evidence that the employees of defendant were instructed that said two rules should be considered together, and that said employees were instructed that said two rules should be interpreted to mean that in yard switching, and particularly switching in the East Peoria Yards where Tennant was killed, engineers should not ring bells upon locomotives

unless the engineers knew that someone was in a position of danger, and if you should further find from the weight of the evidence that engineer England, at the time and place of Tennant's death and after receiving a signal to move his engine, did not know that Tennant was in a position of danger and started his engine without ringing the bell, and if you should further believe from the weight of the evidence that said engineer had a right to believe under all the facts and circumstances that Tennant was looking out for his own safety, then the plaintiff has failed to sustain this specific charge of negligence.

390 You are further instructed that one of the specific act of negligence charged against the defendant in this case was that the employees of defendant carelessly failed to exercise ordinary care to discover the whereabouts of said Harold C. Tennant, while a member of the switching crew, at the time of moving the engine and cars on Track B-28, and you are further instructed that the burden is upon the plaintiff to prove this charge of negligence by the greater weight of evidence in the case, but if you should find by the preponderance of evidence that there was no duty, custom or practice on the part of the employees of defendant in performing yard switching in its East Peoria Yards, to ascertain and inquire as to the location of the members of the crew, including Harold C. Tennant, before moving said engine and cars upon signal by the foreman, and if you should further believe by the weight of the evidence that the engineer and fireman of Tennant's crew had no actual knowledge that Tennant was in a position of danger, and that they had no reason to believe under all the circumstances that he would be in a position of danger, then the plaintiff has failed to establish this specific charge of negligence.

391 The Jury are instructed that if it appears from the preponderance of the evidence in this case that the custom of practice of switching in the East Peoria Yards of defendant, did not require an engineer to investigate and know the whereabouts of every member of his switching crew before he might obey a signal to move his engine, and if you should further believe from the weight of the evidence that at the time and place in question engineer England was performing his duties in the usual and customary manner, and that he had no reason to believe that Tennant was not observing care for his own safety, then the plaintiff has failed to establish the charge of neg-

ligence that the engineer failed to exercise care to determine the whereabouts of Tennant before moving his engine.

392 You are further instructed that if you should find by the greater weight of all the evidence in the case that Harold C. Tennant came to his death through his own carelessness or negligence, then you must find the defendant not guilty.

393 The jury are further instructed that if you should find by the weight of the evidence that the manner in which Harold C. Tennant was killed is not known, and that there were several ways in which he may have come to his death, and that it is a matter of conjecture or uncertainty whether he came to his death through his own negligence or one of the specific acts of negligence alleged against the defendant, then you are not permitted to speculate or guess as to the way in which Tennant was killed.

393½ In the event it becomes proper for you to determine the amount of damages, they are not to be computed upon the wages of deceased, but only upon the contributions which the beneficiaries might reasonably have been expected to receive during the life expectancy of deceased, which amount should be discounted annually by a per cent, representing the present earning power of money; that in making said computation you should not allow an award to the child of the deceased for the period after her majority, and you also have a right to consider the likelihood of the remarriage of the widow, but you are instructed that you are not to consider the amount of damages in this case unless you are satisfied that the defendant has been proved guilty of the charges in the Amended Complaint by the preponderance of all evidence in the case.

394 *Tennant v. Peoria & Pekin Union Ry. Co.*

The Court instructs the jury that, if you find in favor of the plaintiff under the evidence and instructions of the Court, then you will award the plaintiff such sum as you may find and believe from the evidence fairly and reasonably represents the cash value, as of the date of said Harold C. Tennant's death, of such future pecuniary benefits as the widow of said Harold C. Tennant reasonably might have expected to have received from said Harold

C. Tennant if he had not been killed, and such further sum as you may find and believe from the evidence fairly and reasonably represents the cash value, as of the date of said Harold C. Tennant's death, of such future pecuniary benefits as Elizabeth Jean Tennant, the minor child of said Harold C. Tennant, reasonably might have expected to receive during her minority from said Harold C. Tennant if he had not been killed; and, in arriving at the amount to be awarded plaintiff, and fixing the then present, cash value thereof, you will make in each instance reasonable allowance for the earning power of money, and you may take into consideration and account:

1. The age, health, physical condition, habits and earning power of said Harold C. Tennant, deceased;

2. The ages and health of said widow and minor child of said Harold C. Tennant, deceased; and

3. The care, attention, instruction, training and advice that said minor child reasonably might have expected to receive during her minority from said Harold C. Tennant, if he had not been killed.

Your entire award cannot exceed the present cash value, as of the date of said Harold C. Tennant's death, of the actual pecuniary losses, if any, sustained by the said widow and minor child as a result of the death of said
395 Harold C. Tennant, and cannot exceed the sum of $60,000.00, which is the amount sued for herein. Naming the amount sued for in this instruction should not in anyway influence you in arriving at a verdict or its amount, if any, and mention is made thereof solely and only for the purpose of informing you of the amount for which plaintiff has brought suit.

396 The Court instructs the Jury that on and prior to the 12th day of July, 1940, the Defendant had promulgated certain rules and regulations in the operation of its yards and railroad system, and that among said rules and regulations which were in force and effect at the time of the injury and death of Harold C. Tennant was the rule read to you in evidence, known as Rule No. 30, the terms of which are as follows:

"30. The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grades, and to prevent accidents;"

and the Court further instructs the Jury that if you find and believe from the evidence that immediately prior to the time when Harold C. Tennant was injured and killed,

as mentioned in evidence, the said engine did start up from a stationary position and did thereafter make several movements and that on each and every occasion said engine did start up and move, as aforesaid, without ringing the bell of said engine; and if you further find that the said movements of said engine as aforesaid were in violation of the aforesaid rule, and that in thus violating said rule the defendant was then and there guilty of negligence, if you so find, and that as a direct result, in whole or in part, of said negligence in violating said rule, if you so find, the said Harold C. Tennant was thus and thereby injured and killed, if you so find, then your verdict in this case will be in favor of the Plaintiff and against the Defendant herein.

397 The Court instructs the Jury that if you find and believe from the evidence that among other things Defendant's Rule Number 30 read to you in evidence required that the engine bell must be rung when the engine was about to move and if you further find that said Rule was promulgated for the safety of all the employees of said Defendant and that obedience to said Rule was required in order to warn the members of the switching crews using said engine, the members of the public and to prevent accidents, and that a failure to thus ring said bell when the engine was about to move as aforesaid was negligence, if you so find, on the part of the Defendant; then you are instructed in this connection that the mere fact, if you find it to be a fact, that Defendant and its employees did violate said Rule, if you so find, on numerous occasions prior to the time when said Harold C. Tennant was injured, did not alter the standard of care which was owed by said Defendant to its employees on the occasion in question.

398 The Court instructs the Jury that whenever one such as Harold C. Tennant is killed and is therefore unable to testify, the law presumes, in the absence of evidence to the contrary, that at the time of said death he was in the exercise of ordinary care for his own safety; that is the degree of care required of him under the law.

In this connection, you are further instructed that in the event you find that Defendant was guilty of negligence in violating Rule Number 30, heretofore read to you in evidence, then the said Harold C. Tennant did not assume the risk of any injury arising out of said negligent violation of said Rule.

399 Defendant's Interrogatory No. 1.

Were the employees of the defendant, including the deceased, Harold C. Tennant, in his lifetime, instructed that Rule No. 30 and Rule No. 32 of the Transportation Rules of defendant, were to be read, interpreted and construed together, and were said employees, including Harold C. Tennant, in his lifetime, instructed that in the observance of said rules bells were not to be rung upon locomotives engaged in switching operations in the East Peoria Yards of defendant, including Track B-28 thereof, unless the engineer or the fireman upon said locomotive knew that some person was in a position of danger?

400 Defendant's Interrogatory No. 2.

Did the engineer or fireman of the engine with which Harold C. Tennant was working at the time and place of receiving his fatal injuries, and at or about the time said engine was moved for the purpose of pulling a cut of cars from Track B-28 in the East Peora Yards of defendant, have any actual knowledge that Harold C. Tennant, a member of the crew, was in a position of danger?

401 Defendant's Interrogatory No. 3.

Did the engineer or fireman of the engine with which Harold C. Tennant was working as a switchman at the time and place of his fatal injuries, have a right to believe that Harold C. Tennant was familiar with the switching operation then being carried out, and with the intended movement of the engine and cars in the direction in which they moved, and did they further have a right to believe that Harold C. Tennant would observe due care and caution for his own safety, and that he would station himself in a safe position?

402 Defendant's Interrogatory No. 4.

Just prior to the fatal injuries of Harold C. Tennant and after his crew and engine had coupled up the cars on Track B-28 preparatory to moving the same to another part of the yards, was it not the duty of Harold C. Tennant

to see that B-28 switch on the lead track was properly lined for said movement, was he not familiary with the intended switch movement, did he not know that the engine and cars would be moved upon a direct signal from the foreman, and was it not his duty to look out for said movement, stand in a position of safety and observe all due care and caution under the circumstances, to avoid beng run over by said engine and cars?

403 Defendant's Interrogatory No. 5.

At the time and place in question, and just prior to receiving his fatal injuries, had not Harold C. Tennant been instructed and did he not have reason to know from his past experience during his employment with the defendant in said yards, that the engineer or fireman would not ring the bell of the locomotive before moving the same unless they knew that Harold C. Tennant, or some other person, was in a position of danger?

404 Defendant's Interrogatory No. 6.

Was it the custom and practice during switching operations in the East Peoria Yards of defendant, for engineers to make an investigation as to the whereabouts of all members of the switching crew assigned to their engines, and determine that all of them were in a position of safety before they could move their engines?

405 Defendant's Interrogatory No. 7.

At the time and place in question and after engineer England had received a signal from the foreman to back the engine and cars out of Track B-28, was there any duty on his part under the customs and practices of switching in said yards, and in the absence of any positive knowledge that Harold C. Tennant was in a position of danger, to make an investigation as to Tenfiant's whereabouts, and delay the movement of the train until he had determined that Tennant was exercising care for his own safety?

406 Defendant's Interrogatory No. 8.

Were there several possible ways in which Harold C. Tennant received fatal injuries on the night of July 12, 1940, one or more of which were not the result of any negligence on the part of defendant, and is the manner in which he received said injuries a matter of uncertainty, speculation and conjecture?

Endorsed: Filed May 7, 1942, G. W. Schwaner, Clerk.

407 And afterwards, to-wit: on the 7th day of May, A. D. 1942, a certain Verdict of the Jury was filed in the office of the clerk of said court and entered of record in said cause, which said Verdict was and is in the words and figures following, to-wit: Filed May 7, 1942.

408 In the District Court of the United States.

* * (Caption—P-133) * *

We, the Jury, find the defendant guilty and assess plaintiff damage at the sum of Twenty six Thousand two hundred and fifty ($26,250.00) dollars.

/s/ Evelyn D. Siefert,
Foreman.
/s/ Dale Wilson,
/s/ Donald R. Pence,
/s/ George Sea,
/s/ Dwight L. Shaw,
/s/ Joe E. Carithers,
/s/ Nettie McJunkin,
/s/ Claire Shirck,
/s/ Hazel L. Hanna,
/s/ Blanche Brown,
/s/ Dorothy Kelly,
/s/ David H. Snell.

Endorsed: Filed May 7, 1942, G. W. Schwaner, Clerk.

409 And afterwards, to-wit: on the 7th day of May, A. D. 1942, the following further proceedings were had in said court and were entered of record in said cause, to-wit:

Entered May 7, 1942. 410 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-133) * *

Thursday, May 7, 1942.

Court met pursuant to adjournment.

Present, the Honorable J. Leroy Adair, Judge.

And now on this 7th day of May, A. D. 1942, come again the parties to this cause, and comes also the Jury impaneled and sworn herein, and the further trial hereof is resumed. Comes now the defendant and continues with its evidence, and at the close of such evidence the defendant rests. Comes now the plaintiff and presents rebuttal evidence, and at the conclusion of such rebuttal evidence, the plaintiff rests. And now at the close of all the evidence herein, the defendant moves the court to instruct the Jury to find the defendant not guilty, and the court having heard said motion and not being fully advised in the premises, takes the same under advisement. And now after hearing the closing arguments of counsel and the instructions of the Court, the Jury retires in charge of a sworn officer to consider its verdict.

It is ordered by the court that the alternate juror, Dorothy Ochiltree, be and she is hereby discharged.

The Plaintiff and Defendant herein agree to pay for lunch for the twelve jurors and two bailiffs in charge thereof.

And now on this day comes again the Jury into open court, and for verdict say "We, the Jury, find the defendant guilty and assess plaintiff damage at the sum of
411 Twenty-six Thousand two hundred and fifty dollars ($26,250.00)."

Judgment on the verdict.

It is therefore ordered and adjudged by the court that the plaintiff, Mary Tennant, Administratrix of the Estate of Harold C. Tennant, deceased, have and recover of and from the defendant, Peoria & Pekin Union Railway Company, a corporation, the sum of Twenty-six Thousand Two Hundred Fifty and no/100 Dollars ($26,250.00), together with her costs and charges in this behalf expended.

412 And afterwards, to-wit: on the 11th day of May, A. D. 1942, there was filed in the office of the clerk of said court, a certain Notice of Filing Motion for Judgment for Defendant Notwithstanding the Verdict; and in the Alternative Motion for a New Trial and Defendant's Motion for Judgment for Defendant Notwithstanding the Verdict; and in the Alternative Motion for a New Trial, which said Notice and Motion were and are in the words and figures following, to-wit: Filed May 11, 1942.

413 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—P. 133)

NOTICE OF FILING MOTION FOR JUDGMENT FOR DEFENDANT NOTWITHSTANDING THE VERDICT; AND IN THE ALTERNATIVE MOTION FOR A NEW TRIAL.

To: Mr. Mark D. Eagleton,
Mr. Edwin V. Champion,
Attorneys for Plaintiff.

Take notice that within the period of ten days after the return of the verdict in the above entitled case, Peoria and Pekin Union Railway Company, a Corporation, defendant, by its attorney, will file its Motion for Judgment for the defendant Notwithstanding the Verdict and in the Alternative a Motion for a New Trial, a copy of which is hereto attached; and that said Motion will be called up for hearing before the trial Judge as soon as the matter can be heard.

Peoria and Pekin Union Railway
Company, a Corporation,
Defendant.
By /s/ E. E. Horton,
Its Attorney.

Received this 11th day of May, A. D. 1942, the foregoing Notice and a copy of the attached Motion.

/s/ Mark D. Eagleton,
/s/ E. V. Champion,
Attorneys for Plaintiff.

Endorsed: Filed May 11, 1942, G. W. Schwaner, Clerk.

414 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—P-133) • •

MOTION FOR JUDGMENT FOR DEFENDANT NOTWITHSTANDING THE VERDICT; AND IN THE ALTERNATIVE MOTION FOR A NEW TRIAL.

Now comes Peoria and Pekin Union Railway Company, a Corporation, defendant, by its attorney, and moves the Court to set aside the verdict for plaintiff and any judgment entered thereon, and further moves that the Court enter a judgment for the defendant notwithstanding said verdict, for the reasons set forth in a certain motion to direct a verdict for the defendant at the close of all the evidence in the case, this Court having reserved action thereon;

And in the alternative and if the Court should not grant the foregoing motion, then defendant moves that a new trial be granted and in support thereof gives the following reasons:

1. The verdict is against the law and the evidence in the case.

2. The verdict was based upon passion, prejudice and sympathy, and not upon the evidence.

3. The Court charged the Jury with improper instructions which had been submitted by the plaintiff.

4. The Court erred in failing to submit to the Jury written Interrogatories submitted on behalf of the defendant.

415 5. The Court erred in failing to submit to the Jury certain instructions submitted on behalf of the defendant.

6. The verdict was against the manifest weight of the evidence.

7. The verdict for the plaintiff was returned despite the fact that the plaintiff had failed to sustain the specific charges of negligence alleged in the Amended Complaint, by the greater weight of all the evidence in the case.

8. The verdict for plaintiff was entered in disregard of the fact that plaintiff did not establish the allegations of negligence contained in the Amended Complaint, by substantial evidence.

9. The verdict was based upon speculation, conjecture and guesswork.

10. The verdict was returned for the plaintiff despite the fact that there was no evidence showing how the accident occurred; that there were a number of possibilities as to the cause of the accident, in some of which the negligence and carelessness of decedent were the sole and proximate cause; that the Jury could only guess or conjecture as to the cause of the death of decedent under the record in this case.

11. The verdict assesses damages to beneficiaries in this case without proper or sufficient evidence in the record for the computation of such damages as required by law.

12. The Jury assessed damages for beneficiaries in this case without any proof in the record or instructions as to a factor or per cent representing the present earning power of money in this forum.

13. The amount of damages assessed by the Jury was excessive.

14. The amount of the damages assessed by said verdict shows that it was not computed in accordance with rules of law.

416 15. The Court admitted improper evidence on behalf of plaintiff.

16. And for other irregularities in the trial of this case not here specifically mentioned.

Peoria and Pekin Union Railway Company, a Corporation,
Defendant,
By /s/ E. E. Horton,
Its Attorney.

Endorsed: Filed May 11, 1942, G. W. Schwaner, Clerk.

417 And afterwards, to-wit: on the 10th day of June, A. D. 1942, the following further proceedings were had in said court and were entered of record in said cause, to-wit:

Entered June 10, 1942.

418 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—P-133) • •

Wednesday, June 10, 1942.

Court met pursuant to adjournment.

Present, the Honorable J. Leroy Adair, Judge.

And now on this 10th day of June, A. D. 1942, comes the plaintiff herein by Edwin V. Champion and Mark D. Eagleton, her attorneys, and comes also the defendant herein, by E. E. Horton, its attorney, and this cause comes on for hearing on the Defendant's Motion for Judgment for Defendant Notwithstanding the Verdict; and in the Alternative Motion for a New Trial, and the court having heard said motion and not being fully advised in the premises, the ruling thereon is hereby reserved by the Court.

Entered July 1, 1942.

419 And afterwards, to-wit: on the 1st day of July, A. D. 1942, the following further proceedings were had in said cause and were entered of record, to-wit:

420 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—P-133) • •

Wednesday, July 1, 1942.

Court met pursuant to adjournment.

Present, the Honorable J. Leroy Adair, Judge.

The Court having taken certain motions under advisement herein, and having considered same and being now ready to enter his decision therein, it is hereby ordered that the motion by defendant at the close of all the evidence to find defendant not guilty, be and the same is denied; and it is also hereby ordered that the defendant's motion for judgment for defendant notwithstanding the verdict, and in the alternative a motion for new trial, be and the same is denied.

421 And afterwards, to-wit: on the 3rd day of July, A. D. 1942, the following further proceedings were had in said court and were entered of record in said cause, to-wit:

422 IN THE DISTRICT COURT OF THE UNITED STATES. Entered July 3, 1942.

• • (Caption—P-133) • •

Friday, July 3, 1942.

Court met pursuant to adjournment.

Present, the Honorable J. Leroy Adair, Judge.

Now, on this 3d day of July, A. D. 1942, it is ordered by the court that Supersedeas Bond for appeal in the above entitled cause be and the same is fixed at $26,250.00 and costs of $500.00, to be furnished by appellant.

423 And afterwards, to-wit: on the 3rd day of September, A. D. 1942, there was filed in the office of the clerk of said court, a certain Defendant's Notice of Appeal, which said Notice of Appeal was and is in the words and figures following, to-wit: Filed Sept. 3, 1942.

424 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois,

Northern Division.

Mary Tennant, Administratrix of the Estate of Harold C. Tennant, deceased, *Plaintiff-Appellee,* vs. Peoria and Pekin Union Railway Company, a corporation, *Defendant-Appellant.*	Civil Action. No. P-133.

NOTICE OF APPEAL.

To: Mr. Mark D. Eagleton and
Mr. E. V. Champion,
Attorneys for Mary Tennant, Administratrix of the Estate of Harold C. Tennant, deceased, Plaintiff and Appellee:

Notice is hereby given that Peoria and Pekin Union Railway Company, a corporation, Defendant in the above entitled cause, hereby appeals to the Circuit Court of Ap-

peals for the Seventh Circuit from a certain judgment entered in this action May 7, 1942, concerning which Defendant's motion for judgment for the defendant, notwithstanding the verdict, and in the alternative, defendant's motion for new trial, were overruled and denied by the District Court on, to-wit: July 1, 1942.

E. E. Horton,
Attorney for Appellant, Peoria and Pekin Union Railway Company, a corporation.

E. E. Horton,
Attorney at Law,
1009 Alliance Life Bldg.,
Peoria, Illinois.

Endorsed: Filed Sept. 3, 1942. G. W. Schwaner, Clerk.

Filed Sept. 3, 1942.

425 And afterwards, to-wit: on the 3rd day of September, A. D. 1942, there was filed in the office of the clerk of said court, a certain Defendant-Appellant's Statement of Points, which said Statement of Points was and is in the words and figures following, to-wit:

426 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—P-133)

STATEMENT OF POINTS.

Peoria and Pekin Union Railway Company, a corporation, Appellant, makes the following Statement of Points for inclusion in the record on appeal:

1. The court erred in failing to direct a verdict for the defendant at the close of plaintiff's evidence.

2. The court erred in failing to direct a verdict for the defendant at the close of all the evidence in the case.

3. The court erred in failing to enter judgment for the defendant, notwithstanding the verdict.

4. The court erred in refusing to grant a new trial in the alternative.

5. The court improperly charged the jury:

(a) In that the court gave all the instructions offered by defendant first, and thereafter read to the jury all the instructions offered by the plaintiff last, to the prejudice of the defendant; and

(b) The court read to the jury at the end of his charge the following instruction, offered in behalf of the plaintiff, which said instruction was improper, unlawful and prejudicial to defendant:

427 "The Court instructs the Jury that on and prior to the 12th day of July, 1940, the Defendant had promulgated certain rules and regulations in the operation of its yards and railroad system, and that among said rules and regulations which were in force and effect at the time of the injury and death of Harold C. Tennant was the rule read to you in evidence, known as Rule No. 30, the terms of which are as follows:

'30. The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grades, and to prevent accidents;'

and the Court further instructs the Jury that if you find and believe from the evidence that immediately prior to the time when Harold C. Tennant was injured and killed, as mentioned in evidence, the said engine did start up from a stationary position and did thereafter make several movements and that on each and every occasion said engine did start up and move, as aforesaid, without ringing the bell of said engine; and if you further find that the said movements of said engine as aforesaid were in violation of the aforesaid rule, and that in thus violating said rule the defendant was then and there guilty of negligence, if you so find, and that as a direct result, in whole or in part, of said negligence in violating said rule, if you find, the said Harold C. Tennant was thus and thereby injured and killed, if you so find, then your verdict in this case will be in favor of the Plaintiff and against the Defendant herein."

6. The court erred in failing to instruct the jury as to the factor to be used for the current earning power of money, by reason of which the jury could not compute intelligently and properly the present value of the proportion of future earnings which might have been contributed to dependents.

7. The court erred in refusing to give interrogatories submitted by defendant to the jury.

8. The verdict was against the law and evidence in the case.

9. The verdict was against the manifest weight of the evidence in the case.

10. The verdict was in an amount not supported by the facts in the case and was outrageously high, excessive and unreasonable.

11. The amount of the verdict was not computed in the manner prescribed by law for the determination of 428 the loss of contributions to dependents under the Federal Employers Liability Act.

12. The verdict was based upon passion and prejudice.

13. The verdict and judgment are in error because it was not shown by the greater weight of evidence (first) that defendant was negligent, and (secondly) that any negligence on the part of the defendant was the proximate and direct cause of the alleged injuries.

14. The verdict and judgment are in error because it was shown by the greater weight of evidence in the case that plaintiff's intestate came to his death by his own negligence and by reason of his failure to exercise ordinary care and by reason of his failure to observe the rules of the company, and that such negligence and failure to exercise care were the sole and direct cause of his injuries.

15. The verdict and judgment are in error because, under the evidence in the case, there were no eye witnesses to the fatal injuries of plaintiff's intestate, and the circumstances gave rise to a number of possibilities in which decedent might have come to his death, all of which were conjectural and permitted the jury to exercise guess work as to which one of said possibilities might have been the cause, and further in that all of said conjectural possibilities reflected the negligence of the decedent as the sole cause of the fatal injuries.

16. The verdict and judgment are in error because the law will not permit a verdict to stand which is based upon conjecture and speculation.

17. Other errors apparent upon the face of the record.

Peoria and Pekin Union Railway Company, a corporation, Appellant,

By: E. E. Horton,
Attorney.

E. E. Horton,
Attorney at Law,
1009 Alliance Life Bldg.,
Peoria, Illinois.

Endorsed: Filed Sept. 3, 1942. G. W. Schwaner, Clerk.

429 And afterwards, to-wit: on the 3rd day of September, A. D. 1942, a certain Certificate of the Clerk of this Court showing that copies of the Notice of Appeal were mailed to all parties to the Judgment other than the party taking the appeal, was made from the entry made on Civil Docket No. 1, Page 234, and said Certificate was and is in the words and figures following, to-wit: Filed Sept. 3, 1942.

430 United States of America,
Southern District of Illinois, } ss.
Northern Division.

I, G. W. Schwaner, Clerk of the United States District Court in and for the Southern District of Illinois, do hereby certify that on the 3rd day of September, A. D. 1942, an entry was made on Civil Docket No. 1, Page 234, showing that copies of the Notice of Appeal were mailed to all parties to the Judgment other than the party taking the appeal; said copies of the Notice of Appeal being addressed to Edwin V. Champion, Attorney at Law, 909 Alliance Life Building, Peoria, Illinois, and Mark D. Eagleton, Attorney at Law, 1020 Telephone Building, St. Louis, Missouri, counsel for the plaintiff, in the matter of Mary Tennant, Administratrix of the Estate of Harold C. Tennant, deceased, *vs.* Peoria & Pekin Union Railway Company, Civil Action, No. P-133, and said Notices were placed in the United States Mail at the United States Post Office, Peoria, Illinois, postage prepaid, on September 3, 1942.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the aforesaid court at Peoria, this 3rd day of September, A. D. 1942.

G. W. Schwaner,
(Seal) *Clerk, U. S. District Court.*

431 And afterwards, to-wit: on the 3rd day of September, A. D. 1942, there was filed in the office of the clerk of said court, a certain Supersedeas Appeal Bond, (having been approved by the court on July 16, 1942), which said Bond and approval were and are in the words and figures following, to-wit:

Filed Sept. 3, 1942. 432 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-133) * *

SUPERSEDEAS APPEAL BOND.

Know All Men By These Presents: That we, Peoria and Pekin Union Railway Company, a Corporation, as Principal, and New Amsterdam Casualty Company, a corporation of the State of New York, as Surety, are held and firmly bound unto Mary Tennant, Administratrix of the Estate of Harold C. Tennant, deceased, in the penal sum of Twenty-six Thousand Seven Hundred and Fifty Dollars ($26,750.00), to be paid to the said obligee, her successors or assigns, to whom payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Signed with our seals and dated this 16th day of July, A. D. 1942.

Whereas, at a session of the United States District Court for the Southern District of Illinois, Northern Division, in a certain proceeding pending in said court between Mary Tennant, Administratrix of the Estate of Harold G. Tennant, deceased, Plaintiff, and Peoria and Pekin Union Railway Company, a Corporation, Defendant, a judgment was entered against said Defendant on or about the 1st day of July, A. D. 1942, in the amount of $26,250.00, and the Court having overruled motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial, and the said Defendant having filed its Notice of Appeal from said judgment and the Court having en- 433 tered an Order fixing the amount of the Supersedeas Bond to be filed by said Defendant on appeal in the sum of $26,750.00, and

Now the Condition of the Above Obligation Is Such that if the said Peoria and Pekin Union Railway Company, a corporation, Defendant, shall prosecute its said appeal with effect and satisfy said judgment in full, together with costs, interest and damages for delay, if any, if the appeal should be dismissed or if the judgment should be affirmed, and also satisfy in full such modification of the judgment and such costs, interest and damages as the Circuit Court of

Appeals may adjudge or award, then the above obligation to be void; otherwise to remain in full force and virtue.

Peoria and Pekin Union Railway Company, a Corporation,
By: E. J. Rogers,
President.

(Seal)

Attest:
C. Leber,
Secretary.

New Amsterdam Casualty Company,
By: Carlos C. Boaz,
Carlos C. Boaz,
Attorney-in-fact.

(Seal)

This Supersedeas Appeal Bond approved this 16 day of July A. D. 1942.

J. Leroy Adair,
District Judge.

434 State of Illinois, } ss.
City of Chicago. }

On this 16th day of July 1942, before me appeared Carlos C. Boaz, to me personally known, who, being by me sworn, did say that he is the Attorney-in-fact of the New Amsterdam Casualty Company, a duly licensed corporation of the State of New York, and that the seal affixed to foregoing instrument is the Corporate seal of said Corporation, and that said instrument was signed and sealed on behalf of said Corporation, by authority of its Board of Directors, and said Carlos C. Boaz acknowledged said instrument to be the free act and deed of said Corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal of my office in Chicago, the day and year first above written.

/s/ Olive Weiler,
Notary Public.

(Seal)

My Commission expires Feb. 14, 1944.

435 POWER OF ATTORNEY

New Amsterdam Casualty Company

227 St. Paul Street, Baltimore, Md. — Executive Offices — 60 John Street, New York, N. Y.

Know All Men By These Presents:

That the New Amsterdam Casualty Company, a corporation of the State of New York, by C. S. Weech, its Vice-President, and W. L. Langford, its Assistant Secretary, in pursuance of authority granted by a resolution duly passed by the Board of Directors of said Company at a meeting of that body, at which a quorum was present, held on the 11th day of October, 1916, at its office in the City of New York, State of New York, which resolution reads as follows:

"Whereas, it frequently becomes necessary for a representative of the Company to execute a bond on behalf of the Company, which, for lack of time or some other cause, it is impossible to have executed by the regularly elected officers of the Company;

Therefore Be It Resolved, that the President, or any Vice-President, by and with the concurrence of the Secretary or Assistant Secretary, is hereby authorized to empower any representative of the Company to execute, on behalf of the Company, and bond which the Company might execute through its duly elected officers."

does hereby nominate, constitute and appoint H. N. Douglass and or Carlos C. Boaz, Chicago, Illinois, its true and lawful agents and attorneys-in-fact, to make, execute, seal and deliver for and on its behalf, as surety, and as its act and deed any and all bonds or understakings of suretyship, in penalties not exceeding the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00) each; Provided, However, that such bonds or undertakings shall have been executed prior to December 31st, 1942

And when such bonds or undertakings shall have been duly executed pursuant hereto and the corporate seal affixed, they shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the duly elected officers of the Company in their own proper persons. The said Company hereby reserves unto itself, however, the absolute right to revoke this Power of Attorney at any time it may desire so to do.

The said Assistant Secretary does hereby certify that the foregoing copy of resolution is a true copy of the resolution passed by the Board of Directors of said Company at its meeting held on the 17th day of October, 1916, as aforesaid, and that said resolution is still in force.

In Witness Whereof, the said Vice-President and the said Assistant Secretary have hereunto subscribed their names and affixed the corporate seal of the said New Amsterdam Casualty Company, this sixteenth day of June, A. D. 1942.

New Amsterdam Casualty Company,
(Signed) By C. S. Weech,
Vice-President.

(Seal)

Attest:
W. L. Langford,
Assistant Secretary.

436 State of Maryland }
City of Baltimore } ss.

On this 16th day of June, A. D. 1942, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified, came the above named Vice-President and Assistant Secretary of the New Amsterdam Casualty Company, to me personally known to be the individuals and officers described in, and who executed the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, that they know the seal of said corporation, that the seal affixed to the preceding instrument is such corporate seal and their signatures as such officers were duly affixed and subscribed to said instrument by the authority and direction of the said Company, that each is familiar with the handwriting of the other, and that the signatures subscribed to the foregoing instrument are genuine.

In Testimony Whereof, I have hereunto set my hand and affixed my Notarial Seal, at the City of Baltimore, the day and year first above written.

(Signed) Mary E. Frohwitter,
(Seal) *Notary Public.*

My commission expires May 3, 1943.

Certificate.

I, W. C. Gardner, Assistant Secretary of the New Amsterdam Casualty Company, do hereby certify that the foregoing Power-of-Attorney is a true and correct copy of Power-of-Attorney issued to the above named agent and attorney-in-fact and that said Power-of-Attorney is still in force.

In Testimony Whereof, I have hereunto subscribed my name and affixed the corporate seal of the said Company this 16th day of July, A. D. 1942.

(Signed) W. C. Gardner,
Assistant Secretary.

(Seal)

Endorsed: Filed Sept. 3, 1942, G. W. Schwaner, Clerk.

Filed Sept. 14, 1942.

437 And afterwards, to-wit: on the 14th day of September, A. D. 1942, a certain Petition for Order Directing the Forwarding of Original Exhibits with the Record on Appeal and an Order Directing the Forwarding of Original Exhibits as Part of the Record on Appeal were filed in the office of the clerk of said court and said order entered of record in said cause, which said Petition and Order were and are in the words and figures following, to-wit:

438 In the District Court of the United States.

* * (Caption—P-133) * *

PETITION FOR ORDER DIRECTING THE FORWARDING OF ORIGINAL EXHIBITS WITH THE RECORD ON APPEAL.

Now comes Peoria and Pekin Union Railway Company and moves that the Court enter the Order hereto attached, directing the Clerk of the United States District Court to forward the original exhibits therein specified to the Clerk of the Circuit Court of Appeals for the Seventh Circuit, as part of the record on appeal.

Peoria and Pekin Union Railway Company, a corporation,
Defendant-Appellant.
By: /s/ E. E. Horton,
Its Attorney.

Notice to Counsel for Plaintiff-Appellee:

Take notice that on Monday, September 14, 1942, at 2 o'clock P. M., the undersigned will present to the United States District Judge of Peoria, the foregoing Petition and attached Order.

/s/ E. E. Horton,
Attorney for Defendant-Appellant.

439 Received the foregoing Notice together with a copy of said Petition and Order this 12th day of September, A. D. 1942.

/s/ Mark D. Eagleton,
/s/ E. V. Champion,
Attorneys for Plaintiff-Appellee.

Endorsed: Filed Sept. 14, 1942, G. W. Schwaner, Clerk.

440 In the District Court of the United States. Entered Sept. 14, 1942
(Caption—P-133)

ORDER DIRECTING THE FORWARDING OF ORIGINAL EXHIBITS AS PART OF THE RECORD ON APPEAL.

This matter coming on to be heard upon the Petition of Peoria and Pekin Union Railway Company, a corporation, Defendant-Appellant, and the Court having considered the same and being fully advised in the premises

Doth Order:

That the Clerk of the United States District Court for this District be, and he is hereby, directed to forward as part of the record on appeal in this case, to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, the following original exhibits:

Plaintiff's Exhibit A, Transportation Rules;

Plaintiff's Exhibit B, American Experience Tables of Mortality;

Plaintiff's Exhibit C, Certified Copy of Letters of Administration;

Defendant's Exhibit 1, Statement of S. M. Hackless;

Defendant's Exhibit 2, Plat;

Defendant's Exhibit 3, Photograph;

441 Defendant's Exhibit 4, Photograph;

Defendant's Exhibit 5, Photograph;

Defendant's Exhibit 6, Photograph;
Defendant's Exhibit 7, Photograph;
Defendant's Exhibit 8, Photograph.

And the Court further directs that upon the final determination of the case said exhibits shall be returned to the Clerk of this Court.

/s/ J. LeRoy Adair,
Judge.

Entered this 14th day of September, A. D. 1942.

Endorsed: Filed Sept. 14, 1942, G. W. Schwaner, Clerk.

Filed Sept. 3, 1942.

442 And afterwards, to-wit: on the 3rd day of September, A. D. 1942, there was filed in the office of the clerk of said court, a certain Designation of Contents of Record on Appeal by Defendant-Appellant, which said Designation was and is in the words and figures following, to-wit:

443 IN THE DISTRICT COURT OF THE UNITED STATES.

* * * (Caption—P-133) * *

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

Now comes Peoria and Pekin Union Railway Company, a corporation, Appellant, and designates the portions of the record, proceedings and evidence to be contained in the record on appeal herein:

1. The amended complaint.
2. The answer to the amended complaint.
3. The reporter's transcript of the evidence or proceedings.
4. All requests for admission of facts and the responses thereto, both of plaintiff and defendant.
5. All exhibits introduced in evidence, either on behalf of plaintiff or defendant.
6. Motion that the court instruct the jury to find the issues for the defendant at the close of plaintiff's evidence.
7. Motion that the court direct the jury to find the issues for the defendant at the close of all the evidence in the case.
8. Instructions or charges which were given by the

court and in the order in which they were given. (De-
444 fendant's first and plaintiff's last.)

9. All interrogatories which the defendant requested the court to submit to the jury and which request the court denied.

10. The verdict of the jury.

11. The judgment of the court.

12. The motion of defendant for judgment, notwithstanding the verdict and in the alternative a motion for a new trial, together with the ruling of the court thereon and date of such ruling.

13. The notice of appeal and date of filing.

14. The designation of the contents of the record on appeal.

15. The statement of points filed by the appellant.

16. The supersedeas appeal bond filed by appellant, or a copy thereof.

17. The clerk's certificate of the record.

Peoria and Pekin Union Railway
Company, a corporation,
Appellant,
By: E. E. Horton,
Attorney.

E. E. Horton,
Attorney at Law,
1009 Alliance Life Bldg.,
Peoria, Illinois.

Received a copy of the foregoing Designation of Contents of Record on Appeal this 3rd day of September, 1942.

Mark D. Eagleton,
E. V. Champion,
Attorneys for Mary Tennant, Administratrix of the Estate of Harold C. Tennant, deceased, Appellee.

Endorsed: Filed Sept. 3, 1942, G. W. Schwaner, Clerk.

445 And afterwards, to-wit: on the 14th day of September, A. D. 1942, the following further proceedings were had in said court and were entered of record in said cause, to-wit:

Entered Sept. 14, 1942.

446 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-133) * *

Monday, September 14, 1942.

Court met pursuant to adjournment.

Present, the Honorable J. Leroy Adair, Judge.

And now on this 14th day of September, A. D. 1942, comes the plaintiff herein by Edwin V. Champion, her attorney, and comes also the defendant herein by E. E. Horton, its attorney, and on motion of the said defendant, it is ordered by the court that leave be and it is hereby granted the said defendant to file an Additional Designation of Contents of Record on Appeal, and same is hereby filed.

Filed Sept. 14, 1942.

447 And afterwards, to-wit: on the 14th day of September, A. D. 1942, there was filed in the office of the clerk of said court, a certain Defendant-Appellant's Additional Designation of Contents of Record on Appeal, which said Additional Designation was and is in the words and figures following, to-wit:

448 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—P-133) * *

ADDITIONAL DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

Now comes Peoria and Pekin Union Railway Company, a corporation, Defendant-Appellant, and designates additional portions of the record to be contained in the record on appeal herein as follows:

Order of February 3, 1942, granting leave to Defendant to plead to Amended Complaint.

Order of Court denying Defendant's motion for directed verdict at close of Plaintiff's evidence, entered May 5, 1942.

Order of Court of May 7, 1942, taking under advisement Defendant's motion for directed verdict at the close of all the evidence.

Order of June 10, 1942, showing cause heard on Defend-

ant's motion for judgment, notwithstanding verdict, and for new trial reserving ruling thereon.

Order of July 3, 1942, fixing Supersedeas Bond for Appeal in amount of Twenty-six Thousand Seven Hundred Fifty Dollars ($26,750).

449 Petition and Order directing Clerk to forward original exhibits to Clerk of the Circuit Court of Appeals.

Additional designation of contents of record on appeal for Appellant and Order granting leave to file the same.

Peoria and Pekin Union Railway Company, a corporation,
Defendant-Appellant,
By: /s/ E. E. Horton,
Its Attorney.

Notice to Counsel for Plaintiff-Appellee:

Take notice that on Monday, September 14, 1942, at 2 o'clock P. M., the undersigned will ask the Judge of the United States District Court for an Order granting leave to file the foregoing additional designation of contents of record on appeal for Appellant.

/s/ E. E. Horton,
Attorney for Defendant-Appellant.

Received the foregoing Notice and copy of Additional Designation of Contents of Record on Appeal for Appellant this 12th day of September, A. D. 1942.

/s/ Mark D. Eagleton,
/s/ E. V. Champion,
Attorneys for Plaintiff-Appellee.

Endorsed: Filed Sept. 14, 1942, G. W. Schwaner, Clerk.

450 And afterwards, to-wit: on the 16th day of September, A. D. 1942, the following further proceedings were had in said court and were entered of record in said cause, to-wit:

Entered Sept. 16, 1942.

451 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—P-133)

Wednesday, September 16, 1942.

Court met pursuant to adjournment.

Present, the Honorable J. Leroy Adair, Judge.

And now on this 16th day of September, A. D. 1942, comes the plaintiff herein by Edwin V. Champion, her attorney, and comes also the defendant herein by E. E. Horton, its attorney, and now on motion of the said defendant, it is ordered by the court that leave be and it is hereby granted said defendant to file Second Additional Designation of Contents of Record on Appeal, and same is hereby filed.

Filed Sept. 16, 1942.

452 And afterwards, to-wit: on the 16th day of September, A. D. 1942, there was filed in the office of the clerk of said court, a certain Second Additional Designation of Contents of Record on Appeal, which said Second Additional Designation of Contents of Record on Appeal was and is in the words and figures following, to-wit:

453 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—P-133)

SECOND ADDITIONAL DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

Now Comes Peoria and Pekin Union Railway Company, a corporation, Defendant-Appellant, and designates a further portion of the record to be contained in the record on appeal herein as follows:

Stenographic Transcript of the Statement of the Court as to instructions given and refused in the case, and also as to interrogatories refused; and also containing exceptions of counsel to the giving of certain instructions offered by the defendant.

Second Additional Designation of Contents of Record on Appeal and Order thereon.

Peoria and Pekin Union Railway Company, a corporation,
Defendant-Appellant,
By: E. E. Horton.

Notice to Counsel for Plaintiff-Appellee:

Take notice that on Wednesday, September 16, 1942, at 10 o'clock A. M., or as soon thereafter as the matter may be heard, the undersigned will ask the Judge of the United States District Court for an Order granting leave to
454 file the foregoing Second Additional Designation of Contents of Record on Appeal.

E. E. Horton,
Attorney for Defendant-Appellant.

Received the foregoing notice and copy of Second Additional Designation of Contents of Record on Appeal this 15th day of September, A. D. 1942.

Mark D. Eagleton,
E. J. Champion,
Attorneys for Plaintiff-Appellee.

Endorsed: Filed Sept. 16, 1942, G. W. Schwaner, Clerk.

455 United States of America
Southern District of Illinois } ss.
Northern Division

I, G. W. Schwaner, Clerk of the United States District Court in and for the Southern District of Illinois, do hereby certify the foregoing to be a true and complete transcript of the proceedings had of record and on file in the cause entitled Mary Tennant, Administratrix of the Estate of Harold C. Tennant, Deceased, *vs.* Peoria & Pekin Union Railway Company, a Corporation, Civil Action, No. P-133, (made in accordance with Defendant-Appellant's Designations of Contents of Record on Appeal filed therein), as fully as the same appear from the original files and records thereof now remaining in my office.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the aforesaid court at Peoria, this 2nd day of October, A. D. 1942.

G. W. Schwaner,
(Seal) *Clerk, U. S. District Court.*

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, printed under my supervision and filed on the ninth day of November, 1942, in

Cause No. 8128

Mary Tennant, Administratrix of the Estate of Harold C. Tennant, Deceased,
Plaintiff-Appellee,

vs.

Peoria and Pekin Union Railway Company,
Defendant-Appellant,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 21st day of May, A. D. 1943.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the sixth day of October, in the year of our Lord one thousand nine hundred and forty-two, and of our Independence the one hundred and sixty-seventh.

Mary Tennant, Administratrix of the Estate of Harold C. Tennant, Deceased,
Plaintiff-Appellee,
8128 *vs.*
Peoria and Pekin Union Railway Company,
Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

And, to-wit: On the sixth day of October, 1942, there was filed in the office of the Clerk of this Court, an appearance of counsel for Appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8128

Mary Tennant, Administratrix of the Estate of Harold C. Tennant, Deceased,
Plaintiff-Appellee,

vs.

Peoria and Pekin Union Railway Company, a corporation,
Defendant-Appellant.

The Clerk will enter my appearance as counsel for defendant-appellant.

E. E. Horton,
1009 Alliance Life Bldg.,
Peoria, Ill.

Endorsed: Filed October 6, 1942. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fourteenth day of November, 1942, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8128

Mary Tennant, Administratrix of the Estate of Harold C. Tennant, Deceased,

Plaintiff-Appellee,

vs.

Peoria and Pekin Union Railway Co.,

Defendant-Appellant.

The Clerk will enter our appearance as counsel for appellee.

E. V. Champion,
Alliance Life Bldg.,
Peoria, Ill.
Mark D. Eagleton,
Telephone Bldg.,
St. Louis, Mo.
William H. Allen,
1725 Pierce Bldg.,
St. Louis, Mo.

Endorsed: Filed November 14, 1942. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the nineteenth day of January, 1943, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 19, 1943.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Mary Tennant, Administratrix, etc., *Plaintiff-Appellee,* vs. Peoria and Pekin Union Railway Co., *Defendant-Appellant.*	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

8128

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of record and the briefs of counsel, and on oral argument by Mr. E. E. Horton, counsel for appellant, and by Mr. Wm. H. Allen, counsel for appellee, and the Court takes this matter under advisement.

And afterwards, to-wit: On the thirty-first day of March, 1943, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8128. **October Term, 1942, January Session, 1943.**

MARY TENNANT, Administratrix of the Estate of Harold C. Tennant, Deceased, *Plaintiff-Appellee,*

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation, *Defendant-Appellant.*

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

March 31, 1943.

Before SPARKS, MAJOR and KERNER, *Circuit Judges.*

MAJOR, *Circuit Judge.* This is an appeal from a judgment in favor of plaintiff, entered in accordance with a jury verdict; in an action to recover damages resulting from the death of plaintiff's intestate while in the employment of defendant.

The action was brought under the Federal Employers' Liability Act, 45 U. S. C. A. Sec. 51, *et seq.* The amended complaint, so far as now material, alleged that Harold C. Tennant, plaintiff's intestate, while engaged in the scope of his duties and employment as a switchman on the defendant's train, was run over and crushed by said train, from which he sustained fatal injuries. Death was alleged to have been the result of defendant's negligence in whole or in part in two respects, (1) that the defendant in moving and switching its engine and cars failed to ring a bell, in violation of Rule 30 of certain rules and regulations then in effect, and (2) that the defendant failed and omitted to exercise ordinary care to discover the whereabouts of said Harold C. Tennant and negligently moved the engine and cars at a time when his whereabouts was unknown to the members of the switching crew.

The case was submitted to the jury solely upon the first charge of negligence. So far as the record before us discloses, no request was made for submission upon the second charge, and no complaint of the court's action in this respect is shown. Notwithstanding plaintiff's contention here that the proof requires an affirmance upon each of the charges, we are of the view that the case must be decided upon the charge which was submitted to and decided by the jury.

Defendant presents a number of contested issues, the most important of which is the court's refusal to direct a verdict in response to its motion made at the close of the plaintiff's, and renewed at the close of all the proof in the case. Under this issue, defendant contends (1) that proof of negligence was not sufficient to take the case to the jury, and (2) that in any event there was a total want of proof that any negligence shown was the proximate cause of decedent's injuries. Other issues of lesser importance are presented, including alleged error in the court's charge to the jury and its refusal to give special interrogatories submitted by the defendant, and the contention that the verdict was excessive and not in accordance with law.

At the time of his injury and death on July 12, 1940, Tennant was working as a member of a switching crew in one of defendant's East Peoria (Illinois) yards, known as the "B" yard. The crew consisted of Harkless, the foreman; England, the engineer or motorman; Cole, the fireman or motorman's helper; and two switchmen, Tennant and Bonner. Tennant, sometimes referred to as the "pin puller," was the switchman who followed the engine and Bonner was the field man. Tennant had been employed in this same capacity on the same crew for a number of months, and in the same yards for about four years. The crew went on duty at eleven o'clock at night and off at seven o'clock in the morning. One of the jobs which this crew performed regularly each night, and the one which it was engaged in performing on the night of the fatal occurrence, was the removal of cars from track B-28. In so doing, after certain other switching had been done, the engine (a Diesel, electrically operated) was brought down from the north through divide switch B-28 and onto track B-28. The front or pilot end of the engine was headed south. B-28 track south of B-28 switch was a straight track, extending substantially north and south. At this time there were twenty cars, in different groups, on this track. The

job to be performed was the coupling together of these cars and moving them northwardly out of this track to assigned locations in the yards.

The brief for each side contains a lengthy statement of the circumstances surrounding the decedent's death. Inasmuch as the proof must be considered in the light most favorable to the plaintiff, we adopt her statement as to what occurred at and shortly prior to the time of the accident. As the engine moved south on track B-28, the engineer was in his cab on the right side (west side), the fireman in his cab on the opposite side, Tennant was riding on the right front footboard of the engine (on the engineer's side), and Harkless and Bonner had gone ahead, southwardly, down the track on the engineer's side. Harkless marked the empties and the loads and Bonner released the car brakes. Bonner made all the couplings except the first, that is, the coupling between the engine and the first car, which was made by Tennant. The engine was moved on signal from Bonner from time to time until the cars had all been coupled. It was dark and the signals were given by lantern. During this coupling work, the engine had stopped and started some six or eight times. When the coupling had been finished, Harkless and Bonner were at the south end of the train on the engineer's side. Harkless gave the engineer a back-up signal, which meant that the engineer was to back northwardly and pull the cars out of track B-28. At that time, neither Harkless nor Bonner saw Tennant's light. The engineer, in response to Harkless' signal, put his engine in motion, backing it and pulling the cars northwardly. No bell was rung for this or any of the other movements had in the operation which took place on track B-28.

"England, the engineer, was the last man to see Tennant alive. He testified that when he had made the last southward movement in coupling up the cars on track B-28 Tennant was standing alongside of the engineer's cab, on the west side of the track, putting his raincoat under the cab in a compartment there; that it had been raining that night, and that when Tennant put his raincoat in this compartment he got out his cap and jacket and put them on and then walked around to the north or rear of the engine, and that was the last the engineer saw of him. England testified that when Tennant passed around the engine, out of his vision, the engine was five or six car lengths south of divide B-28 switch; a car being about forty feet long. He

said he stood there five or ten minutes, waiting for a signal, and when he got the back-up signal from the rear end he backed up and kept on backing all the way out upon the lead. He said he pulled the cars out on the middle lead, or Nickel Plate lead, far enough so that the rear end of the train would clear No. 41 switch, the next operation being for someone to throw No. 41 switch so that he could go back down the track after getting a signal for the movement; that he expected to get a signal from Tennant at that point but did not get it. He said this was the regular routine of work every night; that Tennant, when on the job, after making the first coupling would walk around the north end of the engine as he did on this occasion; that the foreman would give the signal to back up and pull up on the lead, and then the foreman and field man would cut across to the hammer track to line some switches there and he would back up on the lead and Tennant would finally show up at the B-41 switch and give him a signal to come ahead through that switch.

"England further testified that on the night of July 12, 1940, when he got the back-up signal on track B-28 and began to back up, he did not ring the bell; did not ring it until he 'got down to the crossing.' He said he did not know where Tennant was when he started the engine; that when he received this back-up signal he was looking forward, to the south, and could have seen anyone on the front footboard, but did not see Tennant; that he could not see anyone on the back footboard.

"The train backed up some fifty car lengths, out of track B-28 onto the lead track, moving north and west into another part of the yard, and stopped on the lead beyond switch No. 41 and there waited a while before it was discovered that Tennant was missing. Harkless and Bonner had ridden a distance up track B-28, each on a car of the train, and had then proceeded west across to the repair track to line switches. When the train did not return Harkless walked up the lead track on which it was standing until he reached the engine, and asked the engineer where Tennant was, and the engineer told him he did not know. Harkless then threw the switch to go back from the lead into track B-28, saying they would look for Tennant. The engine was thereupon disconnected from the cars and proceeded back into and southwardly on track B-28. It first had to go in an easterly direction and then to the south. On its return trip the engine went about fifteen car lengths

before Tennant's body was discovered. His body, except for his head and right hand, was found at the B-28 divide switch, on the outside of the west rail of track B-28, right at the switch. His head and right hand were missing. The engine was stopped seven or eight feet north of the body. Members of the crew then walked southwardly and found Tennant's lantern, still lighted, and his right hand, his cap and a large pool of blood about seven or eight car lengths south of the point where his torso had been found. The pool of blood was close to the west rail of the track, a few feet away from the lantern, right hand and cap. The place where the hand, cap, lantern and pool of blood were found was about the place where the engine had stopped in coupling up track B-28. That is, it was about the farthest point south that the engine had been in doing the coupling work mentioned, all movements of the engine after that being to the north and northwest. The crew then went back north with the engine a distance of about fourteen car lengths north and west of the place where the torso was found, and there found Tennant's head lying in a switch frog of the track. That is to say, the torso was found at switch B-28; the head was found about fourteen car lengths north and west of switch B-28, and the right hand, cap and lantern were found seven or eight car lengths south of switch B-28.

"Cole, the fireman, testified, as defendant's witness, that the engine bell was not ringing as the engine started to back out on the lead; that he did not see Tennant walk around on his side while the train was standing there; that he was not looking all the time, but when the engine started in reverse, pulling the cars out of the track, he was keeping a lookout. On cross-examination he was interrogated as to his testimony in his deposition wherein he had stated that he was keeping a lookout on the east side, with his window open, leaning out so he could glance one way or the other; that there was some wait after the cars had been coupled up, and at that time he was sitting on the east side of the engine and keeping a lookout and did not see Tennant on his side of the engine; that Tennant never walked down past him; and he testified at the trial that this testimony in his deposition was correct.

"One Keeler, defendant's assistant superintendent, who at the time of the casualty was chief clerk to the superintendent, testified, as defendant's witness, that he made an investigation of the accident and found some blood on the

west rail of track B-28 near Tennant's right hand and lantern, and that near the hand there was a small galvanized steel spring about two inches in diameter and about ten inches long. He said he looked at the bottom of Tennant's shoes to see whether there was any grass or anything that might have caused him to slip, and inspected the engine and footboard to see if there was any evidence of leather having slipped along the edge of the footboard, but could find nothing to indicate anything of the sort. He testified that he inspected all the wheels of the cars and found only a tiny bit of flesh on the outside rim of the north wheel of the third car from the engine, a bit of flesh possibly a quarter of an inch in diameter; that he found no blood on any of the wheels of the engine. He said there was no evidence on either of the footboards or any other part of the engine of anyone having slipped.

"Defendant's witness Romann, its general roundhouse foreman, testified that on the night of July 12, 1940, after the casualty, he made an inspection of the engine and found no blood or flesh on the wheels and no evidence of any shoe slipping on either of the footboards. And defendant's witness Maloney, its assistant chief car inspector, testified that that night, after the casualty, he examined all of the wheels of the cars that had been on track B-28 at the time of Tennant's injury and found only a speck of flesh on a wheel of one car."

As noted, we have adopted plaintiff's version of the proof relative to the accident. In addition, there are other circumstances not disputed which should be mentioned. England testified that on all previous nights Tennant, after making the first coupling, would go north around the engine and show up at the B-41 switch. After the cut had cleared that switch, he always got a signal from Tennant to proceed. That was the routine thing on all previous nights that Tennant worked as a member of this crew. Tennant's duties, after he had made the first coupling, were to attend to the switches and take care of his own safety. After the engineer had received the back-up signal, it was the custom for the foreman and field man to cut across the yards over to the hammer track. Under such circumstances, Tennant had nothing to do with relaying the signal. England further testified that he thought Tennant had gone on to the 41 switch, as he had done on each previous night.

Harkless testified that after the first coupling, the next

duties of Tennant were to walk back and see that the switches were lined and stay with the engine and exercise care for his own safety. Both Harkless and defendant's roundhouse foreman, Romann, testified in effect that before moving the Diesel engine it was necessary to release the air, throw the engine in reverse and open the throttle, and that when the air was released it made a hissing or whizzing noise which could be heard from fifty to seventy-five feet. Both the engineer and fireman testified that they were keeping a lookout as the engine moved in a northerly direction and did not see Tennant. Neither they nor any other member of the crew or any other person heard any sounds or outcries and had no knowledge as to the manner in which Tennant lost his life. Harkless and Bonner, after riding a short distance on the cars near the rear of the train, got off and walked over to the west, where the next switching operation was to take place. All members of the crew testified that they assumed Tennant was following his usual and ordinary duties. The engine had a footboard, and hand-holds at each end which were in proper condition.

Plaintiff's statement that the place where the right hand, cap and pool of blood were found was seven or eight car lengths south of B-28 switch, or at about the same point the engine stood prior to its backward movement, is based upon the testimony of its witness Harkless. England placed the distance where the engine stood as five or six car lengths south of the switch. Neither of these witnesses, however, had measured the distance. Defendant's chief engineer, who made measurements, testified that the distance from the switch to the point farthest south, where blood was found, was 317.6 feet.

This brings us to the sharply controverted issue as to whether defendant's failure to ring the engine bell at the time of the backward movement, during which plaintiff's intestate lost his life, constituted negligence. In other words, was defendant under a duty to the deceased by reason of Rule 30 to ring the bell at that time and place? Plaintiff contends that by the express language of the rule, the duty was so imposed. On the other hand, it is contended by defendant that the rule itself is not susceptible of such construction and, furthermore, it was the universal practice and custom, known to plaintiff's intestate as well as to all other members of the crew, that the bell was not to be rung under the circumstances attending this movement. Rule 30 provides: "The engine bell must be rung when an

engine is about to move and while approaching and passing public crossings at grades, and to prevent accidents." Also Rule 32, introduced by the defendant, provides: "The unnecessary use of either the whistle or the bell is prohibited." It is claimed that this rule modifies Rule 30, or at any rate must be considered in its interpretation.

Harkless,[1] the crew foreman, was the only witness offered by the plaintiff who testified concerning either the circumstances attending the unfortunate accident or the custom and practice with reference to the application of the rules relied upon. On the other hand, more than a score of witnesses, in addition to members of the instant crew, testified rather emphatically that the practice and custom was for the engineer, upon receiving a signal to proceed, to move the engine without the ringing of a bell unless he had knowledge that some person was in a position of danger. Here again we must consider the proof in the light most favorable to the plaintiff, even though it appears that the testimony of Harkless concerning the custom and practice as to the ringing of the bell is in the main contradicted by all the other testimony in the case, and even though his testimony on several essential matters is either contradicted or repudiated by his cross-examination.

The testimony of Harkless on this feature of the case is stated in plaintiff's brief thus:

> "Harkless testified that it was the practice and custom in this yard to ring the bell before starting an engine, and that when a member of the crew was missing the practice and custom was to stand still, not to move a car or engine when a member of the crew is missing; that such was the custom and practice at that time. On cross-examination he testified that it was the custom and practice in those yards to ring the bell whenever the engine stops and starts; that in coupling operations some men rang the bell and some didn't, but a majority of them did. He was interrogated by defendant's counsel as to defendant's Rule 32—subsequently introduced in evidence by defendant—providing that 'the unnecessary use of either the whistle or bell is prohibited.' He said that rule meant that continual ringing of the bell in the yard was prohibited.

1. Harkless himself had an unsettled claim against defendant concerning which some difficulty arose. He had been demoted from his foreman position to that of a switchman.

On redirect examination he testified that his superiors had never told him that there was any modification of Rule 30, but had told him that it must be obeyed, and that that was true down to the day of the accident; that when an engine had stopped on a track and was about to start in motion they would always ring the bell. And he testified that, while constant ringing of the bell is prohibited, when you are about to start up, under the requirement of Rule 30, the bell must be rung; that the ringing of the bell of a standing engine, preparatory to starting, was meant as a warning to everybody around the engine that it was about to move."

Harkless, in testifying that it is the practice and custom not to move an engine when a member of the crew is missing, gave no explanation as to what is meant by "missing." Other witnesses, however, testified that a "missing" member is one out of place, or one who the engineer knows to be in a place of danger or known not to be performing his duties. Harkless admitted on cross-examination that it was not the practice to ring the bell when an engine moved forward to connect up the next group of cars on a track, and he stated that the ringing of the bell depended upon whether the engineer knew somebody was in a position of danger. He stated that a majority of engineers rang the bell, and admitted that his engineer, England, did not ring the bell while the train was being coupled. He testified to the same switching operation on the night prior to the accident and stated he did not remember whether the bell was rung after England received the signal to pull the cars from the switch. In his cross-examination, the following questions and answers appear:

"Q. How many of the nights prior to July 12 in that period would you say that you heard England ring the bell when he backed that cut out of track B-28?

"A. Well, he rang it some of the time, probably half of the time.

"Q. When he rang it, for what purpose, if you know, did he ring the bell?

"A. Well, to warn other crews of engines—of other engines—and pedestrians around, yard clerks.

"Q. But the men on your crew were supposed to know all about the movement, and did know all about the movement, didn't they?

"A. They knew all about the movement, yes."

Plaintiff also calls attention to certain isolated state-

ments, removed from their context, made by certain of defendant's witnesses which it is claimed support her case that it was customary to ring the bell. It would unduly prolong this opinion to discuss the defendant's evidence in detail. We think that the so-called admissions which plaintiff claims to have obtained from these witnesses on cross-examination have little significance when considered in connection with their testimony as a whole. Briefly, however, we shall mention a few of these so-called admissions. It is pointed out that Keeler, defendant's assistant superintendent, admitted on cross-examination "it was always necessary to ring the bell when the engine was about to move." It is plain, however, that the witness had reference to the requirement that the bell be rung upon passing public crossings, or to warn persons other than members of the crew and to warn the latter when known to be in a position of danger. It is true, also, as plaintiff points out, that a number of witnesses admitted on cross-examination that the rules were to be obeyed, but this admission is somewhat deceptive unless qualified by the testimony of such witnesses that they were to be obeyed in accordance with the custom and practice of the yard. The testimony of fireman Cole is illustrative of this class of witness. True, he testified on cross-examination that the written rules of the company must be obeyed. A reading of his testimony demonstrates without doubt that the rule was to be obeyed in accordance with the custom and the interpretation placed thereon by the railroad officials and the employees. Concerning this custom, there appears in his testimony the following:

"Q. Under the instructions that you received, on what occasions was the bell to be rung by engines switching in the East Peoria yards?

"A. In case anybody is in danger of getting hurt or injured close to the track, or walking across the track, any person.

"Q. Was that somebody that the engineer or the fireman could see were in a position of danger?

"A. Sure.

"Q. Was the rule invoked to require ringing of bells when the engineer or fireman didn't see anybody was in a position of that kind?

"A. No, sir."

We find nothing in his testimony, including his cross-examination, inconsistent with that just quoted.

Hancock, an engine foreman, admitted that the superintendent's instructions as to the use of the bell made no distinction between a member of the crew and a trespasser in the yards. The importance of this admission is of doubtful value when considered in connection with the questions and answers which immediately follow. They are:

"Q. As far as any warnings to do—when an engine was about to move, they were made to warn everybody and save human life?

"A. The movements of the engine were supposed to be understood by all members of the crew.

"Q. Whether they were so understood, you couldn't tell if you were an engineer?

"A. If he receives a signal to move, he understands every man is in a position to protect himself."

As stated, the overwhelming weight of the testimony is to the effect that Rule 30 had long been interpreted to apply to members of a switching crew only in case a member was known to be in a position of danger. To the same extent, it was also shown that such was the custom and practice, not only of the instant crew but of the many other switching crews operating in this yard. However, we have purposely, as plaintiff is entitled to have us do under the law, related the facts in the light most favorable to her and to a large extent ignored the testimony of defendant's witnesses except wherein some admission was made which plaintiff relies upon as favorable. Plaintiff argues that Rule 30 is clear and explicit and that defendant is bound by it, irrespective of any custom or practice. In so arguing, plaintiff refers only to the first phrase of the rule, "the engine bell must be rung when an engine is about to move," and ignores the remainder of the sentence, "and while approaching and passing public crossings at gates, and to prevent accidents."

We doubt that this rule is so free from ambiguity as to put it beyond the bounds of an interpretation such as contended for by the defendant. True, in *Montgomery* v. *Baltimore and O. R. Co.*, 22 Fed. (2d) 359, the court held, with reference to a similar rule although worded somewhat differently, that it was "intended as well for the protection of employees on and about the engine as for the protection of persons upon the track," and that the jury might infer negligence from the fact that the engine was moved without complying with the rule. The court pointed out that "it would require clear proof of established custom to jus-

tify treating this rule as not intended for the benefit of employees on the engine or tender.'" In that case, there was no proof of a custom inconsistent with the rule such as we have in the instant case.

We are not unmindful of the rightful reluctance of trial courts to take from a jury the question of the defendant's negligence in cases such as this, as well as those of similar character. That such reluctance is justifiable is shown by two recent opinions of the Supreme Court, each of which involved a suit under the Federal Employers' Liability Act. *Seago, Administratrix* v. *New York Central R. R. Co.*, 315 U. S. 781, and *Tiller, Executor, etc.* v. *Atlantic Coastline R. R. Co.*, decided February 1, 1943. The former is a Per Curiam opinion, reversing a decision by the Supreme Court of Missouri on the ground that the evidence of negligence was sufficient to take the case to the jury. The latter case reversed a decision of the Fourth Circuit Court of Appeals, largely upon a holding that the assumption of risk doctrine was no longer in any form available as a defense. In such reversal, however, the court expressed the opinion that the evidence of negligence on the part of the defendant should have been submitted to the jury. We have carefully studied these opinions, as well as the opinions of the courts from which these cases went to the Supreme Court (the Supreme Court of Missouri in the former and the Fourth Circuit in the latter), particularly as to the facts concerning negligence. While the facts of these cases are distinguishable, they leave little room for doubt that any proof of negligence, however slight, is sufficient to present a jury question.

Although in the instant case the great preponderance of the proof was to the contrary, we are not prepared to hold as a matter of law that there was no negligence in defendant's failure to ring the bell. However, assuming there was negligence in this respect, that alone was not sufficient to take the case to the jury. That brings us to the even more doubtful element as to whether such negligence, in whole or in part, was the cause of the death of plaintiff's intestate. The requirement in this respect is stated in *Atchison, T. and S. F. Ry. Co.* v. *Toops, Administratrix*, 281 U. S. 351, 354: "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case must be withdrawn

from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. (Citing cases.)"

We have carefully studied the arguments of the parties as presented in their briefs, as well as all the testimony contained in the record, and are forced to the conclusion that no rational inference can be drawn that the failure to ring the bell was the thing which resulted in the unfortunate accident. Before such inference can be indulged, there must be proof supporting a reasonable theory that his death was occasioned by failure of the defendant to warn him of the train movement. Numerous theories are advanced in an effort to explain the deceased's presence beneath the wheels of the train. All of them are highly speculative.

Plaintiff's theory in connection with the failure to ring the bell is stated in her brief as follows:

> "The only inference, indeed, that may be rationally drawn from the above-mentioned testimony of the other members of the crew is that Tennant was north of the rear of the engine, on or about the track, and hidden from the view of the other members of the crew, when the engineer suddenly put the engine in motion, without the ringing of the engine bell; and that by reason of such sudden backward movement of the engine without warning Tennant was then and there run upon and killed. Had Tennant been on the west side of the track, his light would have been visible to both Harkless and Bonner. Had he been on the east side of the track, he would have been seen by the fireman. The engineer admits, indeed, that he knew that Tennant, when last seen, was walking around the engine to the rear or north side thereof, yet when he received a back-up signal he at once sent [is engine backward so as to occupy that very place without giving the warning required by the rule."

At another point in her brief, we find this statement:

> "And there is not a scintilla of evidence that he was on either the front or south footboard of the engine when it started up on this reverse movement."

Later, in a supplemental brief, plaintiff states:

> "Reference has been made to the rule providing that employees must not stand on the track in front of an approaching engine or car for the purpose of boarding the same, but there is not a scintilla of evidence that Tennant stood in front of an approaching engine for the purpose of boarding it."

According to this theory, if it can be thus dignified, the deceased was some place north of the engine, "on or about the track and hidden from the view of the other members of the crew," but positively he was neither standing on the footboard of the engine nor in front (rear) of the engine for the purpose of boarding it. This theory advanced by plaintiff's counsel demonstrates, so we think, that the location of the deceased, as well as what he was doing at the time the engine commenced its movement, is as great a mystery to counsel as it is to all others. The engineer testified that it was about five or ten minutes from the time he last saw the deceased going to the north of the engine until he received the signal to move. It is undisputed but that the deceased at that time had no further duty to perform on or about the engine and that he was next required to be at switch 41. With his lighted lantern, he could of course have been seen by the engineer on one side and by the fireman from the other side any place north of the engine except at a point near the center of the track and close to the engine.

All members of the crew, including Harkless, testified that there had been from six to eight movements of the engine, in the switching operations just prior to the fatal movement, and that the bell was not rung on any of these occasions. The proof also discloses, without any evidence to the contrary, that the deceased had no further duty to perform on or about the engine after he was last seen by the engineer and that his next duty required his presence at switch 41. It is also shown without dispute that it was the custom of the deceased night after night to leave the engine and walk down the track to this switch. The engineer naturally assumed that he had done likewise on this occasion. It must be assumed, so we think, that the deceased knew, as did all other members of the crew, that the coupling of the cars had been completed, that the next movement would be to the rear, and would start upon the engineer receiving the back-up signal from Harkless. It is inconceivable that

deceased with such knowledge would stand on the track in front of the engine, as suggested by plaintiff, and at a place where he had and could have had no duty to perform. This unreasonable inference, if accepted, to be of benefit to the plaintiff must be supplemented by the further inference, even more unreasonable, that the cause of the deceased's injury, as he stood in this known place of danger with knowledge that the engine was shortly to be moved in his direction, was defendant's failure to ring the bell as a warning.

Plaintiff advances the presumption that the deceased relied upon the observance of the rule with reference to the ringing of the bell, and upon the presumption that he was in the performance of his duty at the time of his death. Cases cited in support of such presumptions are of little, if any, help in the instant case. A study of such cases indicates that such presumptions are indulged in in the absence of evidence to the contrary. There is no dispute in the evidence but that the deceased was not in the performance of duty at the time of his death, and we are of the view that the presumption that the deceased was relying upon the engine bell as a warning was entirely overcome by the facts and circumstances of the case.

A discussion of all the numerous theories as to the manner in which deceased met his death would unduly prolong this opinion and perhaps serve no useful purpose. We have deliberately discussed plaintiff's theory, assuming that it was the most plausible from her standpoint. If we were to make a guess as to what happened, it would be one not suggested by either party, and that is that the deceased seated himself on the footboard of the engine and fell asleep. At any rate, this is a more reasonable explanation than that advanced by the plaintiff.

Plaintiff's theory as discussed is predicated on the inference that the deceased was in front of and run over by the engine. One of defendant's theories is that the deceased, after last seen by the engineer, walked in front of the engine and along the east side to a point south of the engine, and that in some manner he was killed while attempting to climb back through the cars to the west side of the train where the other members of the crew were located. In support of this theory, it is pointed out that

1. *Worthington* v. *Elmore*, 297 Fed. 308; *New Aetna Portland Cement Co.* v. *Hatt*, 231 Fed. 611; *Director General of Railroads* v. *Templin*, 268 Fed. 483.

although a careful inspection was made of the wheels of the engine and cars, no evidence of blood or flesh was found on the wheels of the engine or the first two cars. Flesh was found on the front wheels of the third car from the engine. Plaintiff relies upon a number of circumstances which it is argued dispel such a theory. It is pointed out that both the engineer and Harkless testified that the deceased's cap and lantern and the pool of blood were found about where the engine had stood. Neither of these witnesses had measured the distance. The engineer also stated that the engine prior to the movement in question was located five or six car lengths south of switch B-28 or a distance of from 200 to 240 feet. Defendant's chief engineer measured the distance from the switch south to where the blood was found and testified the distance as being 320 feet. It would appear from this calculation that the blood was found a distance of from 80 to 120 feet south of where the engine stood prior to the fatal movement. This theory as to where the deceased was located with reference to the engine at the time he was run over is more reasonable than that advanced by the plaintiff. This is so, notwithstanding the testimony of the fireman that the deceased did not pass around his side of the engine. It is not difficult to construe this statement as meaning no more than that he was not seen to pass around that side. If this theory were accepted, however, it would still be merely a guess as to whether the failure to ring the bell had any connection with the accident. Under this situation, there is not a scintilla of evidence from which it can be inferred as to whether he was on or under a car when the movement started, or undertook to cross over subsequent thereto.

We think we have sufficiently discussed the various theories as to the cause of the decedent's death, particularly plaintiff's theory, to demonstrate that it is shrouded wholely within the realm of speculation and conjecture. As the Supreme Court has held in numerous cases, the situation was such as to require a directed verdict. In *Gulf M. and N. R. Co.* v. *Wells*, 275 U. S. 455, the court in reversing a judgment for the plaintiff for failure to direct a verdict, on page 459 said:

> "In short, we find that on the evidence and all the inferences which the jury might reasonably draw therefrom, taken most strongly against the Railway Company, the contention that the injury was caused by the negligence of the engineer is without any substantial

support. In no aspect does the record do more than leave the matter in the realm of speculation and conjecture. That is not enough."

In numerous cases, wherein the cause of injury could be attributed to any one of numerous things or where the proof gives equal support to inconsistent inferences, the Supreme Court has reached the same result. As was said in *Patton* v. *T. and P. Ry. Co.*, 179 U. S. 658, 663:

> "And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Again, in *Penna. R. R. Co.* v. *Chamberlain*, 288 U. S. 333, 339, the court said:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. (Citing cases.)"

As heretofore stated, the case was submitted to the jury solely upon the charge that the defendant was negligent in its failure to ring the bell, in violation of Rule 30. The record fails to indicate that plaintiff made any objection or took any exception to the manner in which the case was submitted; in fact, the record, as well as plaintiff's brief in this court, indicates that the issue as submitted was approved, if not actually initiated, by the plaintiff. Under such circumstances, the case here must be decided upon the issue which was tried and decided by the court below. *New York, etc. R. R. Co., etc.* v. *Estill*, 147 U. S. 591; *Duignan* v. *United States, et al.*, 274 U. S. 195, 200; *Becker Co.* v. *Cummings*, 296 U. S. 74, 80.

We therefore must conclude that there is no substantial proof in support of the charge that defendant's failure to ring the bell was the proximate cause of the death of plaintiff's intestate and that the court should have directed a verdict in favor of the defendant, or allowed defendant's motion for judgment, notwithstanding the verdict.

The judgment is reversed and the cause remanded, with directions to the District Court to enter judgment in favor of the defendant.

KERNER, *Circuit Judge*, dissenting.

Any movement of the engine without warning was dangerous to life and limb. In addition to the fact that no bell was rung at the time the engineer started to move the engine and that he did not know where Tennant was, there was also evidence that it was the practice and custom not to move an engine when a member of the crew was missing unless the bell was rung as a warning before starting the engine.

I think it was a permissible inference by the jury that the failure to sound the bell was the proximate cause of Tennant's death, and that the inference to be drawn from all the evidence as to the existence of the custom, its purpose and the reliance which Tennant under all the circumstances was entitled to place upon it, was for the jury. Consequently, the judgment ought to be affirmed.

Endorsed: Filed March 31, 1943. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the thirty-first day of March, 1943, the following further proceedings were had and entered of record, to-wit:

Wednesday, March 31, 1943.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Mary Tennant, Administratrix, etc., *Plaintiff-Appellee.* vs. Peoria and Pekin Union Railway Co., *Defendant-Appellant.*	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

8128

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Illinois, Northern Division, and was argued by counsel.

On Consideration Whereof: It is ordered and adjudged by this Court that the Judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to enter judgment in favor of the defendant.

And afterwards, to-wit: On the twelfth day of April, 1943, there was filed in the office of the Clerk of this Court, a Petition for a Rehearing, which said Petition for Rehearing is in the words and figures following, to-wit:

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 8128.

MARY TENNANT, Administratrix of the Estate of Harold C. Tennant, Deceased,

Plaintiff-Appellee,

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation,

Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division, Hon. J. Leroy Adair, Trial Judge.

APPELLEE'S PETITION FOR REHEARING.

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IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 8128.

MARY TENNANT, Administratrix of the Estate of Harold C. Tennant, Deceased,

Plaintiff-Appellee,

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation,

Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division, Hon. J. Leroy Adair, Trial Judge.

APPELLEE'S PETITION FOR REHEARING.

Comes now plaintiff (appellee) in the above-entitled cause and files this, her petition for a rehearing of said cause, and prays that the Court grant her a rehearing of said cause, and as grounds for her said petition states that, in holding that the evidence adduced did not warrant the submission of the case to the jury and that, therefore, the trial court erred in refusing to direct a verdict for the defendant, the Court has inadvertently overlooked material matters of law and fact, as shown by its opinion, and its opinion is contrary to controlling decisions of the Supreme Court of the United States, as follows:

This Honorable Court, in the majority opinion herein, places its decision, reversing the judgment below, on the

ground that the evidence in the record is not such as to warrant a finding that the negligence of the engineer in failing to ring the engine bell before commencing the fatal movement in question, was the proximate cause of Tennant's injury and death. But we respectfully submit that under the evidence contained in this record the question whether such negligence on the part of defendant's engineer proximately caused or contributed to cause Tennant's injury and death is not one that may properly be disposed of by the Court as a matter of law, but is one for the jury.

It appears that the Court reaches its said conclusion on the issue of proximate cause largely because of the lack of positive testimony as to Tennant's exact position and what he was doing at the instant when the engine was suddenly put in backward motion by the engineer without the warning that the rule required; but we respectfully submit that the evidence in this record amply warranted the jury in finding that Tennant was at the time entitled to the protection designed to be afforded by the rule and that the failure to observe the rule proximately caused or contributed to cause his death. The Court, in its opinion, gives expression to the fundamental rule that on motion for a directed verdict the evidence is to be viewed in the light most favorable to the plaintiff, but on the issue of proximate cause has inadvertently failed to make proper application of the rule, has inadvertently overlooked certain features of the testimony, has inadvertently failed to reckon with legitimate inferences favorable to plaintiff, and has inadvertently failed to give effect to presumptions of law arising in plaintiff's favor.

After the last coupling had been made and the engine had stopped (Tr. 196), **which was only five or ten minutes before the engine was suddenly put in motion without warning** (Tr. 197), Tennant, according to the engineer's testimony, first stopped and put his raincoat in a compartment of the engine and then proceeded toward the north

end of the engine, on the west side of the track. And that he did not return is shown by the engineer's testimony (Tr. 196), taken with that of the fireman. The fireman's testimony is that during this little wait he was on the east side of the engine, **keeping a lookout** and that **Tennant never walked past him** (Tr. 219). The Court, in its opinion (p. 16), suggests that it is not difficult to construe this testimony of the fireman as meaning no more than that Tennant was not seen to pass around that side. But we submit that the construction to be placed thereon was a matter for the jury. It follows that the jury could well find that Tennant, when run upon and killed, was about the rear or north end of the engine. And, for reasons to be hereinafter stated, a jury could quite properly find that he was then and there in the performance of his duty.

The Court, on page 14 of its opinion, states that "it is undisputed but that the deceased at that time had no further duty to perform on or about the engine, and that he was next required to be at switch 41." And on page 15 of the opinion the Court states that "there is no dispute in the evidence but that the deceased was not in the performance of duty at the time of his death." But in making such statements the Court evidently overlooked testimony in the case bearing upon the matter. The Court proceeds upon the theory that as soon as the last coupling was made, at the far end of the train, Tennant had no further duty to perform about or in connection with the engine or train; that it was his duty to proceed forthwith to switch 41 for the purpose of throwing that switch. But under the evidence in this record a jury could, with perfect propriety, reach a directly opposite conclusion. The evidence is that it was Tennant's duty to stay with the engine (Tr. 53). Defendant's witness Stringer testified that the pin puller stays with the engine (Tr. 156, 166), and that "if there is any movement of trains in the district he will go out and protect the engine and the lead"

(p. 156). Defendant's witness Hancock testified that it was the duty of the pin puiler **"to stay at the head end and protect the next movement of the train"** (Tr. 166). And defendant's witness Bonner stated that it was Tennant's duty to stay near the head end and "attend to the switches **and protect the cut, engine"** (Tr. 232).

Now, while it appeared that it was Tennant's duty to ultimately proceed to switch No. 41 for the purpose of throwing that switch after the train had been moved northwardly and eastwardly in the yard and was ready to be shoved down track 41, it did not by any means conclusively appear that when the last coupling was effected at the far end of the yard it was his duty to immediately abandon the engine and proceed to switch 41. If it was his duty to remain with the engine and protect this cut of cars and the engine from the movement of other cars or engines, why would that duty not continue during the brief interval that elapsed between the time of the last coupling operation and the giving of the back-up signal, during which time the engineer was looking to the south watching for such signal? Obviously, we submit, under the evidence a jury could with perfect propriety find that it was in the line of Tennant's duty to remain with the engine and protect it and the cut of cars until it should appear that everything was in readiness for the northward movement. He did remain with the engine. And, since he is dead, in the absence of any evidence to the contrary, the law indulges the presumption that he was in the performance of the duty then and there resting upon him. New Aetna Portland Cement Co. v. Hatt (6th Cir.), 221 Fed. 611, 617." And there is—we respectfully say—nothing to warrant an inference that, during the brief interval mentioned, Tennant sat down on the footboard of the tender and went to sleep, as the Court suggests. He is presumed to have been both in the performance of his duty

and in the exercise of due care for his own safety—though contributory negligence is not here a defense.

And on the issue of causal connection between the injury and the death, since Tennant's lips are closed in death **the law indulges the presumption that he relied upon the observance of the rule requiring the ringing of the bell. Director General v. Templin (3rd Cir.), 268 Fed. 483, 485; Koonse v. Mo. Pac. R. Co., 322 Mo. 813, l. c. 825, 826.** And that presumption suffices to take the case to the jury on the issue of causal connection. If Tennant, instead of having been killed, had been injured by the movement of this engine without warning and had come into court and testified that he relied upon the observance of the rule, this, of course, would have sufficed to take the case to the jury on the issue of proximate cause; and, Tennant being dead, the presumption that he relied upon the engineer to give the warning required by the rule operates with equal force to take that issue to the jury.

We respectfully contend that the Court's ruling herein that it was error for the trial court to submit to the jury the question whether the negligence of the engineer proximately caused or contributed to cause Tennant's death is plainly contrary to many controlling decisions of the Supreme Court of the United States.

In the leading case of **Milwaukee & St. Paul Ry. Co. v. Kellog, 94 U. S. 469, l. c. 474,** the Supreme Court of the United States said:

> "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."

And the Supreme Court of the United States, in its most recent decisions, has, we submit, made it entirely clear that, in a case such as is here involved, whether there was

negligence on the part of the defendant or its servants and whether such negligence proximately caused or **contributed to cause** the injury or death are questions not for the Court, but for the jury. It is needless to say that under the Employers' Liability Act it need not appear that the negligence of the carrier or its servants was the sole cause of the injury; it is sufficient if it appear that the injury or death resulted **in whole or in part** from such negligence; if the negligence merely **contributed** to cause the result.

In the late case of **Tiller v. Atlantic Coast Line R. Co., 63 Sup. Ct. Rep. 444**, referred to by the Court in the course of the opinion herein, Tiller, whose duty it was to inspect at night the seals on slowly moving cars on one track, was struck by a train that was backed on an adjoining track; the space between the moving cars being three feet seven and one-half inches. There was no eyewitness to the casualty. The bell of the engine backing the cars on the adjoining track was ringing, but no special warning of the approach of the cars was given. There was no evidence of any rule or custom requiring any such special warning; and it appeared that the deceased knew that employes had been instructed that they must watch out for the movement of trains. The Supreme Court of the United States unanimously and unhesitatingly ruled that whether the defendant was negligent and whether such negligence, if any, was the proximate cause of the injury, were questions of fact to be resolved by a jury.

The opinion of this Honorable Court in the instant case is, we submit, directly in conflict with the ruling of the Supreme Court of the United States in the Tiller case. Indeed, in our humble judgment, the facts of this case are much more strongly in favor of the plaintiff than are the facts of the Tiller case.

Anent the issue of proximate cause the Court in its opinion (pp. 16 and 17) cites and quotes from Gulf, M. & N.

Ry. Co. v. Wells, 275 U. S. 555; Patton v. T. & P. Ry. Co., 179 U. S. 658, and Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333. Each of these cases involved facts entirely unlike the facts of the instant case. They are "good examples of what is meant by only a scintilla of evidence"; cases resting upon speculation and conjecture. **Hardin v. Illinois Central R. Co., 334 Mo. 1169, l. c. 1188.** We submit, they have no tendency to support the view that in the instant case there is no substantial evidence that the negligence of defendant's engineer proximately caused or contributed to cause the injury and death of the deceased; and that the excerpts quoted by the Court from the opinions therein are not here controlling or persuasive.

In **New York Central R. Co. v. Marcone, 281 U. S. 345**, to which we referred in our original brief, the deceased, whose duty it was to lubricate and service engines in the roundhouse, was run over and killed by an engine that had been lubricated and serviced and was being removed from the roundhouse by an engine hostler. There was no eye-witness to the casualty. The deceased's body was found upon the track after the engine had passed over it. The hostler had sounded the whistle, but there was a brief wait thereafter before he backed the engine out of the roundhouse. **There was not a word of testimony as to what the deceased was doing or attempting to do at the time of the casualty.** He had no further duty to perform in connection with that particular engine. The Supreme Court of the United States, however (281 U. S., l. c. 349, 350), said:

> "**Any movement of an engine without warning was dangerous to life and limb.** After the hostler mounted the engine and before it was moved sufficient time elapsed for the deceased to come into proximity with it, which was dangerous, if, as the jury might have found, he could not be seen from the engine cab by the hostler and was not warned of the impending movement. **Under the evidence it was for the jury to**

say whether petitioner exercised due care in moving the engine without a more specific and effective warning and whether the failure to give it was the cause of the death." (Emphasis ours.)

In the instant case, as His Honor, Judge Kerner, said in his dissenting opinion, "**any movement of the engine without warning was dangerous to life and limb.**" Tennant was where he could not be seen by either the engineer or the fireman, and he was not warned of the impending movement. In this case, we submit, just as in the Marcone case, it was for the jury to say whether the failure to give the warning required by defendant's own rule caused or contributed to cause the death.

Respectfully submitted,

MARK D. EAGLETON,
E. V. CHAMPION,
WM. H. ALLEN,
Attorneys for Plaintiff-Appellee.

Certificate of Counsel.

Mark D. Eagleton, E. V. Champion and Wm. H. Allen, counsel of record for plaintiff-appellee in the above entitled cause, do hereby certify that the above and foregoing petition of plaintiff-appellee for a rehearing of said cause is filed in good faith and is believed by them to be meritorious.

Mark D. Eagleton.
Mark D. Eagleton.

E. V. Champion.
E. V. Champion.

Wm. H. Allen.
Wm. H. Allen.

Attorneys for Plaintiff-Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 8128

MARY TENNANT, Administratrix of the Estate of Harold C. Tennant, Deceased, *Plaintiff-Appellee*,

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation, *Defendant-Appellant*.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

Hon. J. Leroy Adair, Trial Judge.

APPELLANT'S ANSWER TO PETITION FOR REHEARING.

E. E. Horton,
Alliance Life Building,
Peoria, Illinois,
Attorney for Defendant-Appellant.

THE BLAKELY PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

Endorsed: Filed April 12, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the sixteenth day of April, 1943, there was filed in the office of the Clerk of this Court, an Answer to Petition for Rehearing, which said Answer is in the words and figures following, to-wit:

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 8128

MARY TENNANT, Administratrix of the Estate of Harold C. Tennant, Deceased, *Plaintiff-Appellee,* vs. **PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation,** *Defendant-Appellant.*	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division. Hon. J. Leroy Adair, Trial Judge.

APPELLANT'S ANSWER TO PETITION FOR REHEARING.

Now comes Peoria and Pekin Union Railway Company, a corporation, defendant-appellant herein, and answering Appellee's Petition for Rehearing says that said Petition fails to show that this Court has misapprehended the law or the evidence in its opinion, or that its opinion is contrary to controlling decisions of the Supreme Court of the United States.

The Court in this case painstakingly analyzed the record with the purpose of viewing the evidence in the light most favorable to the plaintiff. But where the record is barren of evidence tending in any way to show, without resort to guesswork and speculation, that the alleged act of negligence was the proximate cause of the injuries, the Court

could not find otherwise than as it decided the issues herein. Plaintiff had the burden of proof, and if she proved nothing she cannot prevail.

Counsel for plaintiff place great reliance upon *Tiller* v. *Atlantic Coast Line R. Co.*, 63 Sup. Ct. 444. The decision in that case that the doctrine of assumption of risk was no longer available as a defense does not apply here because the defendant did not make that defense herein. But since it was also decided in that case that the issues should have been submitted to a jury, it is now inferred by counsel that in *all* cases, questions of negligence and proximate cause must be submitted to a jury. The Supreme Court did not say that. It did not reject and repudiate the precedents of *Atchison, T. & S. F. Ry.* v. *Toops*, 281 U. S. 351, 50 Sup. Ct. 281; *Gulf, M. & N. R. Co.* v. *Wells*, 275 U. S. 455, 48 Sup. Ct. 151; or *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275.

In the Tiller case the Court said no more than that where there are disputed questions of fact, the case should not be withheld from the jury, and this has always been a rule of decision. Justice Black was announcing no new doctrine, and quoted from old Supreme Court decisions in this regard.

Side by side with this doctrine there has always existed the other rule of decision, as exemplified by *Atchison, T. & S. F. Ry.* v. *Toops*, *Gulf, M. & N. R. Co.* v. *Wells*, and *Patton* v. *Texas & Pacific Ry. Co.*, *supra*. These cases hold that where the contention that injury was caused by negligence is without substantial support, and the record does no more than leave the matter in the realm of speculation and conjecture, the case will not be permitted to go to the jury. As said in the Patton case:

> "And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a

dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

And as said in the Toops case, on page 282 thereof:

"But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. * * * *What actually took place can only be surmised.* Whether he was run down on the track by the first car, or he attempted unsuccessfully to board the train on one side or the other or succeeded, and in either case finally came to his death by falling under or between the moving cars, is a matter of guesswork. * * * If allowed to sustain the verdict, it would remove trial by jury from the realm of probability, based on evidence, to that of surmise and conjecture."

These cases have not been overruled by *Tiller* v. *Atlantic Coast Line R. Co.*, 63 Sup. Ct. 444. Let us analyze for a moment the facts in the Tiller case. They are but briefly traced in the Supreme Court's decision. But reference is therein made to the finding of evidence by the Circuit Court of Appeals. (*Tiller* v. *Atlantic Coast Line R. Co.*, 128 Fed. 2d 420.) There it is shown that there was some evidence on the part of the plaintiff that there was an error in the classification of cars which necessitated the movement into the Clopton Yard, and also some evidence that the movement into the track where Tiller was killed was an unusual one. There was no conjecture or speculation as to what Tiller was doing at the time of his death. He was inspecting the seals on the cars on the adjacent track, where the distance was reduced by the overhang of the cars moving in opposite directions on the two tracks to 3 feet, 7½ inches. The Circuit Court of Appeals found that Tiller probably

did not hear the cars approaching. He was carrying out definite duties at the time of his death, and if these required him to go into a position of danger, and if there was some evidence that the car movement was unusual, there is presented a situation totally unlike the case at bar.

The principal distinction between the Tiller and the Tennant case is that the facts do not reveal where Tennant was and what he was doing at the time of his death. No one knew, nor did the circumstances reveal whether the failure to ring a warning bell had anything to do with his death or not. There is no train of causation connecting the alleged negligence with Tennant's death,—nothing but conjecture, speculation or guesswork as to the effective cause of his injuries. Under some of the possible theories, each of which is based upon some evidence, he might have known that the engine and cut were being moved and thereafter sought to do some dangerous and careless thing which was the effective and direct cause of his death. Or it is possible, based upon circumstances, that he might have unnecessarily posted himself in so perilous a position, and had become so inattentive through sleep or otherwise, that it would have been impossible for him to extricate himself from his voluntary position of peril, whether the warning had sounded or not at the time of the movement of the engine. This is why the Tennant case falls under the rule of the decision in *Atchison, T. & S. F. Ry.* v. *Toops* and the other similar precedents. It is impossible, for a judge or a jury, or even the lawyers in the case, to determine, without resort to guesswork and surmise, what did cause Tennant's death, and in this respect it is wholly unlike the Tiller case and others cited by plaintiff.

Tracing again the various possible theories as to the cause of Tennant's death, we note the following:

1. Tennant might have walked around the north end of the engine and back to the east side of the cut. Harkless,

plaintiff's chief witness, said that switchmen sometimes did that and thereafter sought to climb back between the cars. (Rec. 86.) Fireman Cole, who was in the east side of the engine cab, said that he did not see Tennant walk around on his side of the train, but that he was not looking all the time. The signals were not being given on his side of the cut. (Rec. 217.) After the accident, Tennant's hand, with the lantern about one inch from his fingers, was found in close proximity to a galvanized steel spring between the rails. (Rec. 138.) This spring was 320.7 feet from the B-28 switch. (Rec. 113.) Engineer England was of opinion that the engine had shoved five or six car lengths south of the switch or a distance of 200 to 240 feet. Harkless thought that the engine had pushed in seven or eight car lengths. (Rec. 89.) Neither England nor Harkless had measured the distance. Nevertheless, this lends weight to the theory that Tennant was not run over by the engine, but by one of the cars further south in the cut. The third car from the north end of the cut was the only one upon the wheels of which were any evidence of the accident. England had not seen Tennant go back south along the cut to this point from his side (the west side) of the cut, although he was keeping a lookout in that direction all the time. Therefore, it is possible, based upon evidence, that Tennant had gone around on the east side of the train for some purpose; that when the cut started he endeavored to climb back between the second and third cars so that he would be on the proper side of the train where signals were being given; that in attempting this dangerous and forbidden practice he fell and was run over by the third car. If this is what he was doing, the failure to ring the locomotive bell was no cause of his death. Under plaintiff's theory of the case the bell should have been run to warn switchmen of the movement of the train, but if Tennant knew that the train was moving and thereafter sought to do such a dangerous thing as climbing between the moving

cars, his own carelessness and not that of the employer was the effective and direct cause of the injury.

2. Tennant might have gone around the north end of the engine and thereafter climbed up on the pilot-beam to rest. This was a dangerous and improper thing to do. Harkless testified that there was a place there where a man could sit down, but that it was an improper place for a man to sit. (Rec. 86.) Burch, night general yardmaster, said that he had observed Tennant on previous occasions sitting up on the pilot-beam of the engine. (Rec. 173.) Burch said that it was a high perch and that a man might slip in getting up there or slip in getting down; also that if a man did get up there and dozed off, and the engine started, he could fall off. Therefore, this is another theory based upon evidence that Tennant might have fallen from this perch either before or after the engine had started. He might have fallen in getting up there or in getting down before the cut started and might have been lying across the rail, unconscious, at the time the engine started. In such event, the failure to have rung a warning bell was no proximate cause of his death. No one knows what happened, and this is a possibility based upon some evidence and particularly the evidence of his previous habits.

3. Tennant might have been investigating the shining, galvanized spring by thrusting his hand and lighted lantern between the wheels before or after the train had started. The spring was an attractive object, and the hand and lantern were found in close proximity thereto. This possible careless act of curiosity is supported by some evidence and is a possible conjectural theory.

4. Tennant might have been sitting on the footboard asleep, out of sight of all other members of the crew. If he had placed himself in such a dangerous predicament he possibly could not have extricated himself whether the bell had rung or not, and he might possibly have been insensible

to the bell if it had rung. This is a possible surmise noted by the Court.

5. Tennant might have been standing in front of the engine, between the rails, out of sight of all members of the crew, when the engine moved toward him. It is quite possible that he knew the engine was moving and that he had chosen this spot from which to mount the footboard. As the Court will remember, this was specifically forbidden by the General Rules of the company with reference to employees, as follows:

> "They must not stand on the track in front of an approaching engine or car for the purpose of boarding the same." (Rec. 117.)

Plaintiff advances the guess that Tennant was standing in front of the engine, between the rails, carrying out his duties of protecting the cut, and complains of the finding of this Court that under the evidence Tennant could not have been carrying out his duties at the time of his injuries. The evidence, even as specified by plaintiff, required that Tennant protect the next movement of the train and attend to the switches. The requirement that he remain near the head end involved attendance of the switches in the direction in which the train was about to move, and meant that he should not wander off some place else, go to sleep, or carelessly get himself into a position of unnecessary peril. Plaintiff's alleged presumption that Tennant was doing his duty must fail where there are facts and circumstances to the contrary. Engineer England said that after Tennant had made the first coupling he had no further duties to perform with reference to this movement, except to go out on the lead and find out whether the switch was lined. Instead, Tennant broke the precedent of previous nights and remained somewhere around the cars. Rule 702 (Rec. 117) required a trainman to observe signals before placing himself in a dangerous position. Tennant disregarded this (if we are to follow plaintiff's theory) by getting between

the rails, immediately in front of the engine, out of sight of everyone, where no one could see Tennant or his light, and where he could not see the other members of the crew or their signals. Harkless has said it was not customary to ring the bell during coupling and slacking operations. One of the General Rules to employees was that they must expect trains to run at any time, on any track, in either direction. (Rec. 117.) If it was Tennant's intention to remain with the engine until it moved out, he could have stood on the ground, along the west side of the engine, in safety, where he could have observed the signals, or he could have stood upon the footboard, where there were safe handholds. But if, as surmised by plaintiff, he had chosen the center of the track, in front of the engine, as a place to stand during the five or ten minute wait, then the more reasonable hypothesis is that he heard the hissing of the air (concerning which the evidence was uncontradicted), was thus warned of the impending movement of the engine, chose this spot from which to attempt to step on the footboard, and, as a direct result of his negligent and improper conduct, fell under the wheels.

As was said in the case of *Wheelock* v. *Freiwald*, 66 Fed. 2nd 694, at page 697:

> "The Federal Employers' Liability Act does not make an employer an insurer of the safety of its employees, but to entitle plaintiff to recover, the defendants must have been guilty of some act of negligence *which was the proximate cause of Freiwald's death.*
>
> • • •
>
> "A verdict cannot be permitted to stand, which rests upon conjecture, surmise or speculation, but plaintiff must produce *substantial affirmative proof that the negligence of the carrier caused the injury*, and where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of

sustaining one of these inferences as against the other, before he is entitled to recover."

Here, as in the Freiwald case, the Toops case, and other similar decisions, one can only conjecture from the record as to what was the proximate cause of Tennant's death. The burden was upon plaintiff to produce substantial affirmative proof of the cause of death, but plaintiff was unable to do so and hence there was no question for the jury. Conjecture, uncertainty and guesswork are not enough. The evidence has left the matter uncertain, leaving only a number of possible theories, any one of which may have brought about the injury. Under the decisions above cited, in this type of case, the jury will not be permitted to speculate between these various hypotheses and guess that negligence of the employer was the proximate cause of Tennant's death. Indeed, every possible theory as to the cause of Tennant's death is supported by some circumstantial evidence that some unwarranted, forbidden and negligent act of his own was the sole and proximate cause of his injuries.

For the reasons above stated the plaintiff has not shown that this Court has misapprehended the law or the facts. The petition should be denied.

Respectfully submitted,

E. E. Horton,

Attorney for Defendant-Appellant.

Endorsed: Filed April 16, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the thirteenth day of May, 1943, the following further proceedings were had and entered of record, to-wit:

Thursday, May 13, 1943.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Mary Tennant, Administratrix, etc., *Plaintiff-Appellee,* vs. Peoria and Pekin Union Railway Co., *Defendant-Appellant.*	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

8128

It is ordered by the Court that the petition for a rehearing of this cause be, and it is hereby, denied.

And afterwards, to-wit: On the fifteenth day of May, 1943, there was filed in the office of the Clerk of this Court, a Motion to Stay Mandate, which said Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8128.

Mary Tennant, Administratrix of the Estate of Harold C. Tennant, Deceased,
Plaintiff-Appellee,
vs.
Peoria and Pekin Union Railway Company, a Corporation,
Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

Hon. J. Leroy Adair, Trial Judge.

MOTION OF APPELLEE TO STAY MANDATE PENDING APPELLEE'S APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI.

Comes now the appellee in the above entitled cause and states that appellee desires to apply to the Supreme Court of the United States for a writ of certiorari to review the decision of the Court in said cause, as shown by the Court's opinion rendered herein on March 31, 1943, and moves and prays that an order be made staying and withholding the mandate of this Court in said cause pending appellee's said application for said writ, in accordance with the Rules of this Court in such cases made and provided.

Respectfully submitted,

Mark D. Eagleton,
E. V. Champion,
Wm. H. Allen,
Counsel for Appellee.

Endorsed: Filed May 15, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fifteenth day of May, 1943, the following further proceedings were had and entered of record, to-wit:

Saturday, May 15, 1943.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

Mary Tennant, Administratrix, etc., *Plaintiff-Appellee,* vs. Peoria and Pekin Union Railway Co., *Defendant-Appellant.*	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.
8128	

On motion of counsel for appellee, it is ordered that the issuance of the Mandate of this Court in this cause be, and it is hereby, stayed, pursuant to Rule 25 of the Rules of this Court.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed, excepting briefs of counsel, motions and order re filing additional authorities, in

Cause No. 8128

Mary Tennant, Administratrix of the Estate of Harold C. Tenrant, Deceased,
Plaintiff-Appellee,

vs.

Peoria and Pekin Union Railway Company,
Defendant-Appellant,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 21st day of May, A. D. 1943.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 9 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

MARY TENNANT, Administratrix of the Estate of Harold C. Tennant, Deceased,
Petitioner,
vs.
PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation,
Respondent.

No. 1084

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit

and

BRIEF IN SUPPORT THEREOF.

MARK D. EAGLETON,
E. V. CHAMPION,
WILLIAM H. ALLEN,
Attorneys for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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Statutes Cited.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

MARY TENNANT, Administratrix of the Estate of Harold C. Tennant, Deceased,
Petitioner,
vs.
PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Mary Tennant, administratrix of the estate of Harold C. Tennant, deceased, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for the Seventh Circuit rendered

and entered on the 31st day of March, 1943, in this case lately pending in said Court of Appeals, entitled Mary Tennant, Administratrix of the Estate of Harold C. Tennant, deceased, Plaintiff-Appellee, v. Peoria and Pekin Union Railway Company, a corporation, Defendant-Appellant, being cause No. 8128 of civil causes on the docket of said Court of Appeals, reversing a judgment of the United States District Court for the Southern District of Illinois, Northern Division, in said cause, in favor of your petitioner and against respondent herein.

OPINION OF THE COURT BELOW AND DISSENTING OPINION.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit in said cause of Mary Tennant, Administratrix of the Estate of Harold C. Tennant, deceased, Plaintiff-Appellee, v. Peoria and Pekin Union Railway Company, a corporation, Defendant-Appellant, which petitioner here seeks to have reviewed, appears on pages 292 to 309, inclusive, of the printed transcript of the record filed herewith, and the dissenting opinion of Judge Kerner appears at page 309 of the record. Said opinions have not as yet been published.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was instituted by petitioner, Mary Tennant, administratrix of the estate of Harold C. Tennant, deceased, against respondent, Peoria and Pekin Union Railway Company, a corporation, on the 29th day of September, 1941, in the United States District Court for the Southern District of Illinois, Northern Division, under the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65) to recover for the alleged wrongful death of said Harold C. Tennant, deceased, who, while in respondent's employ as a switchman, was run over and killed by a train being moved by respondent in its switching yard (R. 2), leaving surviving him a widow and a minor child, for whose benefit this suit was brought (R. 24, 25). Petitioner, plaintiff in the District Court, alleged in her amended complaint that Tennant's death was proximately caused by the negligence of respondent's employees in charge of the engine of said train in failing to ring the engine bell when the engine was about to move and in starting said engine without ringing the bell, in violation of a rule adopted and promulgated by respondent and then and there in force and effect, known as Rule 30, providing that "the engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grades, and to prevent accidents," and in starting said engine without ascertaining that Tennant was in a place of safety (R. 2-5).

As appears from the evidence and proceedings at the trial of the cause in the District Court, before the Court and a jury, Tennant was run over by respondent's train and instantly killed on July 12, 1940, while in respondent's employ as a member of a switching crew in one of respondent's East Peoria yards in the State of Illinois, known as the "B" yard. Respondent is and at the time of Ten-

nant's injury and death was a common carrier by railroad engaged in interstate commerce, and Tennant, at the time of his injury and death, was employed by respondent in such commerce (R. 17-19, 103-105).

On the night of the casualty the switching crew of which Tennant was a member consisted of Harkless, the foreman; England, the engineer or motorman; Cole, the fireman or motorman's helper; and two switchmen, Tennant and Bonner (R. 47). Tennant, referred to as the "pin puller," was the switchman who followed the engine (R. 53). Bonner was the field man (R. 78). The engine was a Diesel engine, electrically operated (R. 49). After the crew had done certain other switching, the engine, with no cars attached, was brought down from the north on a lead track and moved southwardly through divide switch B-28 and into track B-28 (R. 48, 49). The engine was headed south, that is, the front or pilot end was to the south (R. 49). Track B-28, south of B-28 switch, was a straight track extending approximately north and south (R. 50, 53), and was used as a classification track for bad order cars (R. 115). Upon this occasion, when the engine came "against" track B-28 from the north, there were twenty cars south of it on that track, in three or four different groups; the cars in each group being coupled together (R. 49, 228-230). These groups were to be coupled together and the twenty cars were to be then pulled northwardly up track B-28 and from that track to and upon the lead track and then northwardly and westwardly in the yard, and were to be ultimately placed on track 41, the repair track, also referred to as the "rip" track or "hammer" track (R. 54, 197). As the engine moved forward, southwardly, down track B-28, England, the engineer, was in his cab on the right side, the west side of the engine (R. 77, 78), and Cole, the fireman, was in his cab on the east side of the engine (R. 219). Tennant remained with the engine, and Harkless, the foreman, and

Bonner, the field man, went southwardly, down track B-28, on the engineer's side, the west side of the track (R. 51, 79). Harkless marked the "empties" and "loads" and Bonner released the brakes of the cars (R. 51). Tennant gave the signals for making the first coupling (R. 79, 228). The first car was standing about a car length south of B-28 switch (R. 93, 194, 228). Thereafter Bonner gave the engineer the signals for the couplings (R. 229). The engine was moved and stopped on signals from Bonner from time to time until all the cars on track B-28 had been coupled together (R. 229, 230). It was dark and the signals were given by lantern (R. 229). During this coupling work the engine came to a stop and started up again some six or eight times (R. 53). After some of the couplings had been effected the engine had hold of nine cars, all coupled together, and there was one remaining group of cars on track B-28 some distance farther south (R. 230). On signal from Bonner the engineer shoved the nine cars to the south and the last coupling was effected (R. 230, 231). The engineer testified that on this last coupling movement he shoved ahead, to the south, five or six car lengths (R. 196). When this coupling work had been finished and the train had come to a standstill, Harkless and Bonner were at the south end of the train, twenty car lengths from the engine on the west side of track B-28, the engineer's side (R. 52, 53); and the engineer was in his cab, looking to the south, watching for a backup signal (R. 197, 200). The engineer testified that the engine was then standing about five or six car lengths south of B-28 switch, a car being forty feet long (R. 197). Harkless testified that the train had pushed into track B-28 seven or eight car lengths in coupling up that track (R. 89). There was a brief wait, of about five or ten minutes, before the engineer received the backup signal, during which time the engine and train remained stationary (R. 79, 197, 231). It was during this interval

that Tennant was last seen alive. The engineer saw him on the west side of the track "alongside of the cab" of the engine, putting his raincoat under the cab in a compartment provided for clothes (R. 196). It had been raining (R. 196). And the engineer testified that when Tennant put his raincoat in this compartment, he got out his cap and jacket and put them on and then walked "around the engine," that is, to the north or rear of the engine, and that was the last he saw of him (R. 196, 197, 201); that he kept on looking south (201). Cole, the fireman, testified that during this wait he was sitting in his cab on the east side of the engine and keeping a lookout and that Tennant did not return on that side of the engine (R. 219). Harkless testified that it was Tennant's duty to stay with the engine (R. 53). Respondent's witness Stringer testified that the pin puller stays with the engine and if there is any movement of trains in the district he will go out and protect the engine and the lead (R. 156). Respondent's witness Hancock testified that it was the duty of the pin puller to stay at the head end and protect the next movement of the train (R. 166). Bonner testified that it was Tennant's duty to stay near the head end and attend to the switches and protect the cut and engine (R. 232). Shortly after Tennant was last seen by the engineer as aforesaid, Harkless, who was near the south end of the train, gave the engineer a backup signal (R. 54, 197, 233). At that time neither Harkless nor Bonner could see Tennant's light (R. 84, 233). In response to that backup signal the engineer immediately put his engine in motion, backing up and pulling the cars northwardly (R. 54, 199, 233). The undisputed evidence is that no bell was rung for that movement (R. 61, 199, 218).

On said backup movement the twenty cars were pulled out of track B-28, and the train was then moved north and west in the yard for a distance of about fifty car lengths until it was on the "middle lead" and far enough

north for the rear thereof to clear switch No. 41 leading into track No. 41 (R. 54, 56, 198). It was Tennant's duty to proceed through the yard to switch No. 41 and throw that switch to enable the engineer to shove the cars southwardly into track No. 41 (R. 55, 56, 197, 198). This was the regular routine (R. 198, 199). Upon this occasion Tennant did not show up at switch No. 41 to throw that switch (R. 55, 56). In the meantime, Harkless and Bonner, having ridden the train some distance north on track B-28, had dropped off and had gone across the yard to line switches (R. 54, 55). When the cars were not backed into track No. 41 as was contemplated, but the train remained stationary on the lead north of switch No. 41, Harkless walked up to the engine to investigate and, finding that Tennant's whereabouts were unknown, threw a switch to enable the crew to return with the engine to look for Tennant (R. 56). The engine was thereupon disconnected and the engineer, fireman and Harkless proceeded therewith back over the same route that the train had previously been moved, finally moving into and southwardly on track B-28 (R. 56). On this return trip Tennant's body was discovered at the B-28 divide switch, on the outside of the west rail of track B-28 (R. 56). His head and right hand were missing (R. 56, 57). The engine was stopped seven or eight feet north of the body and members of the crew then walked southwardly and found Tennant's lantern, still lighted, his right hand and his cap and a large pool of blood on the track, the pool of blood being close to the west rail (R. 57, 58). The crew then went back northwardly with the engine a distance of some fourteen car lengths north and west of B-28 switch and there found Tennant's head lying in a switch frog (R. 65).

Harkless testified that the hand, lantern, cap and pool of blood were about seven or eight car lengths south of B-28 switch where the torso was found (R. 58). He further testified that the place where the hand, cap, lantern

and pool of blood were found was about the place where the engine was stopped after the last coupling had been made on track B-28 (R. 58). He further testified that he stepped off the distance from B-28 switch to where the hand, lantern, cap and blood were found and that it was approximately three hundred feet (R. 89).

One Keeler, respondent's assistant superintendent, testified that after the casualty he made an investigation and found some blood on the outside of the ball of the west rail of track B-28 about 315 feet south of B-28 switch (R. 137); that about a foot and a half north of that mark there was some blood, and near by, between the rails, was Tennant's right hand and his lighted lantern (R. 137, 138). He inspected Tennant's shoes and the engine footboards and found no evidence of anyone having slipped (R. 139); and inspected the wheels of the cars and found no blood on them, but found a tiny bit of flesh on the outside rim of the north wheel of the third car from the engine (R. 138). Respondent's chief engineer, Thornberry, also made an investigation and testified that the first blood mark found on the rail was 317.6 feet south of B-28 switch, and that nothing was found south of that (R. 113). Respondent's general roundhouse foreman, Romann, examined the engine after the casualty and found no blood or flesh on the wheels thereof and no evidence on the footboards of any "shoe slipping" (R. 186).

Respondent's rules, issued in its rule book in 1929, consisted of the standard set of rules theretofore adopted by the Association of American Railroads (R. 132). Rule 30 thereof, read in evidence, provided that the "engine bell must be rung when the engine is about to move" (R. 60, 61). Harkless testified that it had long been the practice and custom in this yard that when a member of the crew was missing the engine bell would be rung and the engine would not be moved while the man was missing (R. 62);

that it was the custom and practice in the yards to ring the bell when the engine stopped and started (R. 80); though engineers did not always ring the bell in the course of coupling operations (R. 81, 82). He further testified that when an engine had stopped on a track and was about to start in motion they would always ring the bell (R. 93). His attention was called to Rule 32—later introduced in evidence by respondent (R. 117)—providing that "the unnecessary use of either the whistle or bell is prohibited," and he testified that Rule 32 meant that the continual ringing of the bell in the yard was prohibited (R. 99), but that when you are about to start up, under the requirement of Rule 30 the bell must be rung (R. 100); that the ringing of the bell of a standing engine, preparatory to starting, was meant as a warning to everybody around the engine that it was about to move (R. 102).

Respondent's witness Keeler, over petitioner's objections (R. 118, 119), testified that he had instructed respondent's employees from time to time, including Tennant, that Rules 30 and 32 were to be read together and that it was not necessary for the bell to be rung every time an engine started (R. 119-121). On cross-examination he said it was always necessary to ring the bell when the engine was about to move (R. 134), but said he told the men that the bell would not always be rung, because at places where there are many engines, all ringing a bell, the bell is useless (R. 135). There was but the one engine working in the yard at the time of this casualty (R. 93).

And over petitioner's objections (R. 141) respondent adduced the testimony of a number of its employees as to their instructions regarding Rules 30 and 32. There was testimony that the employees were told that the rules were elastic and to use their own judgment (R. 143); that they were instructed to ring the bell if necessary (R. 145), but not unless it was necessary (R. 162), and that it was left

to the engineer's discretion to determine when it was necessary (R. 168); that the bell was rung only at grade crossings and where men other than members of the crew were working about the track (R. 154, 214), and not in the yards unless the engineer knew that some one was in a position of danger (R. 141, 142, 154, 181, 184); that bells were not rung where there was continual switching of cars (R. 147, 148) or during coupling operations (R. 178), and that the bell was not to be rung continuously while an engine was either in motion or standing, such use of the bell being eliminated so that a man can hear a bell when an engine is about to start from a standing position (R. 164). Cole, the fireman of this train, testified that no superintendent or other officer had ever told him that Rule 30 pertained only to track men and others not members of the crew (R. 221). All of respondent's employees who were interrogated as to the matter said they were instructed to obey the written rules of the company (R. 144, 146, 150, 160, 176, 221).

Witnesses for respondent denied that it was the custom and practice in the yards for an engineer not to move his engine upon signal until he knew that every member of the switching crew was in a place of safety (R. 128, 142, 146, 148, 155, 163, 169, 179, 180-82). England, the engineer of this train, at first testified that this was the custom and practice; that he always practiced that (R. 189, 190), but then changed his testimony and denied that such was the practice (R. 190). It was shown that in a deposition he had testified that such was the custom and practice (R. 203, 204), and that in a written statement signed by him he had stated that it was the usual practice and custom that a train should not be moved while a man was missing (R. 242-244).

The trial of said cause in the District Court resulted in a verdict and judgment on May 7, 1942, in favor of petitioner (plaintiff) and against respondent (defendant) in

the sum of $26,250.00 (R. 263). Thereafter respondent, in due course, appealed said cause to the United States Circuit Court of Appeals for the Seventh Circuit (R. 269-278), where said appeal was perfected, and the cause was, on the 19th day of January, 1943, argued by counsel and submitted upon said argument and briefs of counsel, and was taken under advisement by the Court (R. 291). Thereafter, on March 31, 1943, said Court of Appeals filed an opinion in said cause written by Judge Major of said court and concurred in by one other member of the court, Judge Sparks, wherein the Court ruled that, though there was evidence of negligence on the part of respondent's engineer in failing to ring the bell before putting the engine in motion on said fatal movement, there is no substantial proof in the record that such negligence was the proximate cause of the death of petitioner's intestate, Tennant, and that consequently the District Court should have directed a verdict in favor of respondent or should have allowed respondent's motion for judgment notwithstanding the verdict (R. 292-309). And on said 31st day of March, 1943, said Court of Appeals entered judgment in said cause, in accordance with the above-mentioned opinion, reversing said judgment of the District Court in favor of petitioner and remanding the cause to the District Court with directions to that Court to enter judgment in favor of respondent. (R. 310).

And on said March 31, 1943, his Honor, Judge Kerner, one of the Judges of the said Court of Appeals before whom said cause had been argued, filed in said cause a dissenting opinion wherein he held that the case made was one for the jury, and that the judgment of the District Court should be affirmed (R. 309).

Thereafter, on the 12th day of April, 1943, and within the time allowed therefor by the rules of said Court of Appeals, petitioner duly filed in said cause, in said Court of Appeals, her petition for a rehearing of said cause (R.

311); and on April 16, 1943, respondent filed its answer to said petition (R. 323).

And thereafter, on the 13th day of May, 1943, petitioner's said petition for a rehearing of said cause was by said Court of Appeals denied, whereby and on which day said judgment of said Court of Appeals in said cause became final (R. 335).

The duly certified record, including all of the proceedings in said cause, in said District Court and in said Court of Appeals, is filed herewith under separate cover, together with the requisite number of printed copies thereof.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Title 28, U. S. C. A., Sec. 347, providing for review by this Court, by certiorari, of decisions of the Circuit Courts of Appeals. The judgment of the United States Circuit Court of Appeals for the Seventh Circuit here sought to be reviewed was entered on March 31, 1943 (R. 310). A petition for a rehearing was duly filed by this petitioner, appellee in said Circuit Court of Appeals, on April 12, 1943, within the time provided by the rules of said Circuit Court of Appeals (R. 311), and said petition for a rehearing was denied by said Circuit Court of Appeals on May 13, 1943 (R. 335).

QUESTIONS PRESENTED.

The questions presented by petitioner's petition herein for a writ of certiorari are:

(1) Whether in this case, an action against a carrier by railroad under the Federal Employers' Liability Act (45 U. S. C. A., Section 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), to recover for the death of a switchman who was run upon and killed by a train of the defendant at

night in its switching yard while employed by the defendant in interstate commerce, the evidence adduced at the trial of the cause, hereinabove summarized, with the inferences fairly and reasonably arising therefrom, sufficed, under the applicable decisions of this Court, to warrant the submismission to the jury of the issue whether the death of said deceased proximately resulted, in whole or in part, from the negligence of respondent's engineer in charge of the engine of said train who, after having seen the deceased go "around the engine," to the rear end thereof, and without knowing whether he was in a place of safety, negligently moved said engine backward from a stationary position without the ringing of the engine bell in violation of a rule of respondent providing that "the engine bell must be rung when an engine is about to move" and contrary to the custom and practice in said yard, or whether the evidence adduced constituted no substantial evidence to take said issue of proximate cause to the jury as held in the opinion of the Court of Appeals herein, rendered by a majority of the Judges thereof sitting at the hearing of the cause in that Court, and upon which ground alone that Court reversed the judgment of the District Court herein in favor of this petitioner.

(2) Whether, by the opinion and judgment of the Court of Appeals in this cause, petitioner was denied a right to which she is lawfully entitled under the Federal Employers' Liability Act, namely, the right, specifically set up and claimed by her, to have a jury pass upon the question whether, under the evidence adduced in this cause, the injury and death of said deceased, while employed by respondent in interstate commerce, resulted in whole or in part from the negligence of respondent's engineer in putting his engine in backward motion without the ringing of the bell, in violation of respondent's rule and contrary to the custom and practice in the yard.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) In this case the action is one under the Federal Employers' Liability Act (45 U. S. C. A., Section 51, Act of April 22, 1908, c. 149, sec. 1, 35 Stat. 65) to recover for the death of a railway employee, a switchman employed by respondent in interstate commerce, by reason of having been run upon and killed by a train of respondent herein, and alleged to have resulted from the negligence of respondent's engineer in charge of the engine of said train in starting said engine backward from a stationary position without the ringing of the engine bell, in violation of a rule of respondent providing that "the engine bell must be rung when the engine is about to move," and contrary to the custom and practice in said yard. It was undisputed that upon the fatal movement the engine was put in backward motion without the ringing of the bell, after it had been standing stationary for five or ten minutes, and after the engineer had seen the deceased go "around the engine," to the rear end thereof, and without the engineer knowing whether the deceased was in a position of safety, and that the deceased was thereupon run upon, cut to pieces and killed; and evidence was adduced at the trial of said cause which, with the inferences fairly and reasonably to be deduced therefrom, tended with great force to show that the death of said deceased proximately resulted from said negligence of respondent's engineer. Nevertheless, the Court of Appeals for the Seventh Circuit, in the majority opinion of that Court in said cause, though holding that there was evidence of negligence on the part of the engineer, ruled that there was no substantial proof that such negligence was the proximate cause of the death of said deceased, and upon that ground alone reversed the judgment of the District Court in favor of petitioner (R.

292-309). Said ruling on the issue of proximate cause is erroneous and not in accord with the applicable decisions of this Court holding that on the question of whether a case is one for the jury the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to the plaintiff that may be fairly and reasonably drawn from the evidence; that all conflicts in the evidence are to be resolved in favor of the plaintiff; that the credibility of the witnesses and the weight to be given to their testimony are for the jury; and that if on any determinative issue in the case reasonable and fair-minded men may honestly draw different conclusions from the evidence, such issue is not one of law for the court, but one of fact for the jury. And said ruling is not in accord with, but is directly contrary to, the applicable decisions of this Court holding that what is the proximate cause of an injury is ordinarily a question for the jury, to be determined as a fact in view of the circumstances of fact attending it, and that the finding of the jury upon that question must stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts.

(2) In this case, wherein petitioner, widow of Harold C. Tennant, deceased, and administratrix of his estate, claimed the right, as such administratrix, to recover under the Employers' Liability Act for the death of said Tennant, who was run upon and killed by a train of respondent at night in its switching yards while employed by respondent as a switchman in interstate commerce, the evidence adduced at the trial of the cause in the District Court showed that respondent's engine, headed south, that is, with the pilot end to the south, moved southwardly through switch B-28 and into track B-28 in respondent's yard in order to couple together certain groups of cars on that track, consisting of twenty cars in all, and then pull

the cars northwardly out of said track and take them to another part of the yard; that Tennant was the switchman who followed the engine, and it was his duty to remain with the engine and protect it from the movement of other engines and cars on the track; that after the groups of cars had been coupled together there was a brief wait, of five or ten minutes, during which the train remained stationary, and during that time respondent's engineer was in his cab on the west side of the engine, looking south, awaiting a backup signal; that during this brief waiting period the engineer saw Tennant on the west side of the track "alongside of the cab" of the engine, saw him put his raincoat and hat in the compartment of the cab, put on his jacket and cap "and walk around the engine" to the north or rear end thereof, whereupon he disappeared from the engineer's view and was not afterwards seen alive by anyone; that a few minutes later the engineer did receive a lantern backup signal from a switchman near the south end of the train and immediately put his engine in reverse motion, backing it northwardly up the track, without the ringing of the bell, in violation of a rule of respondent providing that "the engine bell must be rung when an engine is about to move," and contrary to the practice and custom in said yard, and without taking any steps to ascertain whether Tennant was in a place of safety, whereupon Tennant was run upon, cut to pieces and killed; that it was not known that Tennant had been killed until after said train had been moved north and west in the yard a distance of about fifty car lengths and after members of the crew had returned with the engine to look for Tennant, whereupon his remains were found at different places upon the track; and that the place where he was run upon was shown by the location of his severed right hand, his lantern and cap and the large pool of blood on the track, which were in the immediate vicinity

of where the engine stood before making said fatal backup movement. Such evidence, with the inferences arising therefrom, amply warranted the jury in finding that Tennant's death resulted in whole or in part from the said negligence of defendant's engineer. The decision of the Court of Appeals for the Seventh Circuit that, though the failure to ring the bell when said engine was about to move constituted evidence of negligence, there was no substantial proof that such negligence proximately caused or contributed to cause Tennant's death, is plainly not in accord with the applicable decisions of this Court. Such decision is clearly violative of the fundamental principles to be observed in passing upon a request for a directed verdict as announced and applied in a long line of decisions of this Court. It is a matter of prime public importance that the rights vouchsafed to railroad employees and their dependents by the benign provisions of the Federal Employers' Liability Act be fully recognized, protected and enforced by every court in the land in which an action may lawfully be brought under the act. To that end, and to the end, too, that right and justice may ultimately prevail in this case, this Honorable Court's writ of certiorari should issue herein.

(3) The United States Circuit Court of Appeals for the Seventh Circuit, by its said opinion and judgment in this cause, denied petitioner a right, specifically set up and claimed by her as the administratrix of her deceased husband's estate, to which she is entitled under the Federal Employers' Liability Act, namely, the right to have the judgment of a jury on the question whether the injury and death of said deceased, while employed by respondent in interstate commerce, resulted, in whole or in part, from the said negligence of respondent's engineer, when there was evidence rightfully engendering that conclusion and re-

quiring the submission of that issue to a jury. It is respectfully submitted that the denial to petitioner of such right plainly calls for the issuance by this Court of its writ of certiorari.

PRAYER.

Wherefore petitioner prays that a writ of certiorari be issued by this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit to the end that said opinion and judgment of said Court of Appeals in said cause of Mary Tennant, Administratrix of the Estate of Harold C. Tennant, Deceased, Plaintiff-Appellee, v. Peoria and Pekin Union Railway Company, a corporation, Defendant-Appellant, No. 8128 in said Court of Appeals, be reviewed by this Court, as provided by law, and that upon such review said judgment of said Court of Appeals be reversed, and that petitioner have such other relief as this Court may deem appropriate.

Respectfully submitted,

MARK D. EAGLETON,

E. V. CHAMPION,

WILLIAM H. ALLEN,

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW, AND DISSENTING OPINION.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit in said cause of Mary Tennant, Administratrix of the Estate of Harold C. Tennant, Deceased, Plaintiff-Appellee, v. Peoria and Pekin Union Railway Company, a Corporation, Defendant-Appellant, which petitioner here seeks to have reviewed, appears on pages 292-309, inclusive, of the printed transcript of the record filed herewith. And the dissenting opinion of Judge Kerner in said cause appears on page 309 of the record. Said opinions have not, as yet, been published.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's petition for a writ of certiorari herein, and in the interest of brevity are not repeated here. Reference will be made to such facts, on the points involved, in the course of the argument which follows.

SPECIFICATIONS OF ERROR TO BE URGED.

The United States Circuit Court of Appeals for the Seventh Circuit, in the majority opinion of that Court in this cause, erred:

(1) In holding and deciding that the evidence adduced at the trial of said cause in the District Court did not suffice to make the case one for the jury under the Federal Employers' Liability Act.

(2) In holding and deciding that no substantial evidence was adduced at the trial of said cause in the District Court to warrant the submission to the jury of the issue whether the negligence of respondent's engineer, in putting his engine in motion without the ringing of the bell and without taking any steps to ascertain whether the deceased was in a place of safety, proximately caused or contributed to cause the death of said deceased.

(3) In holding and deciding that, under the evidence adduced at the trial of said cause, the cause of the death of said deceased was left to speculation and conjecture.

(4) In reversing the judgment of the District Court and remanding the cause to that Court with directions to enter judgment in favor of the defendant, respondent herein.

SUMMARY OF THE ARGUMENT.

I.

(1)

The ruling of the Court of Appeals that—though there was evidence to support a finding that respondent's engineer was negligent in putting his engine in backward motion without the ringing of the bell in violation of respondent's rule and contrary to the custom and practice of the yard—there is no substantial proof in the record to support the charge that Tennant's death proximately resulted, in whole or in part, from such negligence, is erroneous and out of accord with the applicable decisions of this Court.

(2)

On the question whether a jury case is made, the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be reasonably drawn from the evidence. It is the province of the jury to resolve all conflicts in the evidence and to pass upon the credibility of the witnesses and the weight to be given to their testimony. And if, on any determinative issue in the case, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, such issue is one for the jury.

Tiller v. Atlantic Coast Line R. Co., 63 Sup. Ct. Rep. 444, 87 L. Ed. 446;
New York Central R. Co. v. Marcone, 281 U. S. 345, 349, 74 L. Ed. 892;
Gunning v. Cooley, 281 U. S. 90, 94, 74 L. Ed. 720;
Best v. District of Columbia, 291 U. S. 411, 416, 78 L. Ed. 888;
Myers v. Pittsburgh Coal Co., 233 U. S. 184, 190-193, 58 L. Ed. 906;
Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 497, 498, 73 L. Ed. 473.

(3)

What is the proximate cause of an injury is ordinarily a question for the jury, to be determined as a fact in view of the circumstances of fact attending it; and the finding of the jury upon that question must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts.

Milwaukee & St. Paul R. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256;
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 566, 75 L. Ed. 544.

(4)

Under the evidence in this record, considered in the light of the above mentioned principles, whether the engineer was guilty of negligence in putting his engine in motion under the circumstances without a ringing of the bell, and whether Tennant's death proximately resulted, in whole or in part from such negligence, if any, were questions for the jury.

(a)

Rule 30 is a clear and explicit rule, requires no construction, and of itself constitutes substantial evidence that reasonable care requires the precaution that the rule directs.

Montgomery v. Baltimore and Ohio R. Co. (6th Cir.), 22 Fed. (2) 359.

(b)

The evidence relating to the rule and the custom and practice in the yard amply warranted a finding that Tennant was entitled to rely upon a warning by the bell before the engine was put in motion. And since he is dead, the

presumption prevails, in the absence of evidence to the contrary, that he did rely thereupon.

Director General of Railroads v. Templin (3rd Cir.), 268 Fed. 483, 485.

(c)

Since there was evidence that it was Tennant's duty to remain with the engine and protect it and the train from other movements on that track, the law indulges the presumption that at the time of his death he was in the performance of such duty.

New Aetna Portland Cement Co. v. Hatt (6th Cir.), 231 Fed. 611, 617.

(5)

The ruling of the Court of Appeals in this case is out of accord with many applicable decisions of this Court, among which are:

Tiller v. Atlantic Coast Line R. Co., 63 Sup. Ct. Rep. 444, 87 L. Ed. 446;

New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892;

Seago v. New York Central R. Co., 315 U. S. 781, 86 L. Ed. 1188, 62 Sup. Ct. 306, reversing Seago v. New York Central R. Co., 348 Mo. 761, 155 S. W. (2) 126;

Myers v. Pittsburgh Coal Co., 233 U. S. 184, 58 L. Ed. 906;

Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473.

ARGUMENT.

I.

This is an action under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), brought by the widow of Harold C. Tennant, deceased, as administratrix of his estate, to recover damages for the alleged wrongful death of said deceased, charged to have been proximately caused by the negligence of respondent's engineer in starting an engine and train from a stationary position at night in respondent's switching yard without the ringing of the engine bell, in violation of respondent's rule 30, providing that the engine bell must be rung when an engine is about to move and contrary to the custom and practice in the yard, and in starting said engine without ascertaining whether the deceased, a switchman, was in a place of safety.

Section 51 of Title 45, U. S. C. A., supra, provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

The trial of said cause in the District Court resulted in a verdict and judgment in favor of the plaintiff, this petitioner. On the appeal of the defendant, this respondent, to the United States Circuit Court of Appeals for the Seventh Circuit, that Court, in an opinion by Judge Major, Circuit Judge, concurred in by Judge Sparks, Circuit Judge,

held—though evidently with reluctance—that the failure of the engineer to ring the bell before putting the engine in motion, as to which there was no dispute, constituted evidence of negligence (R. 298-303), but held that there is no substantial proof in the record to support the charge that such negligence was the proximate cause of the death (R. 303-309). Petitioner submits that, in the light of the applicable decisions of this Court, said last-mentioned ruling is, upon this record, plainly erroneous, and that by such ruling the Court usurped the function and authority of the jury.

(2)

It is the well-settled rule of decision of this Court that on the question whether a case was made entitling the plaintiff to the judgment of a jury the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn from the evidence; that it is the province of the jury to resolve all conflicts in the evidence and to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on any determinative issue in the case, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, such issue is one for the jury. Tiller v. Atlantic Coast Line R. Co., 63 Sup. Ct. Rep. 444, 87 L. Ed. 446; New York Central R. Co. v. Marcone, 281 U. S. 345, 349, 74 L. Ed. 892; Gunning v. Cooley, 281 U. S. 90, 94, 74 L. Ed. 720; Best v. District of Columbia, 291 U. S. 411, 415, 416, 78 L. Ed. 888; Myers v. Pittsburgh Coal Co., 233 U. S. 184, 190-193, 58 L. Ed. 906; Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 497, 498, 73 L. Ed. 473.

(3)

And it is also the settled rule of decision of this Court that what is the proximate cause of an injury is ordinarily a question for the jury, to be determined as a fact in view of the circumstances of fact attending it, and that the finding of the jury upon that question must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts. Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256; Story Parchment Co. v. Paterson Parchment Paper Co. et al., 282 U. S. 555, 566, 75 L. Ed. 544.

(4)

It is submitted that a proper application of these established principles of law to the evidence in this record plainly required a holding by the Court of Appeals that the issue of proximate cause as well as that of negligence was one for the jury; and that the jury having resolved both of said issues in favor of this petitioner, plaintiff below, the Court was not lawfully at liberty to disturb the jury's finding on either of them.

We mean no disrespect to the Honorable Judges of the Court of Appeals who promulgated the majority opinion of the Court herein when we say that therein the Court rendered lip service to the rule that upon a defendant's motion for a directed verdict the evidence must be taken most strongly against the defendant and viewed in the light most favorable to the plaintiff, but utterly failed to apply the rule to the facts of the record before the Court, utterly failed to realize that a proper application of the principles hereinabove stated to the evidence adduced would compel a holding that the issue of proximate cause, as well as that of negligence, was one for the jury and was concluded by the jury's verdict.

Since the Court of Appeals came to the conclusion that there was evidence of negligence on the part of respondent's engineer (R. 303), the evidence relating to that issue need not be considered except as it may have a bearing also upon the issue of proximate cause. As to whether Tennant was entitled to rely upon the observance of the rule and custom, it may be noted that Rule 30, one of a set of standard rules long ago adopted by the Association of American Railroads (R. 132), is a clear and explicit rule, requires no construction, and of itself constitutes substantial evidence that reasonable care requires the precaution that the rule directs (Montgomery v. Baltimore and Ohio R. Co. [6th Cir.], 22 Fed. [2] 359). And though respondent was permitted to undertake to make it appear that the rule did not mean what it said, and was not to be taken seriously, there is abundant evidence in this record that both the rule and the custom and practice in the yard required that the engine bell be rung when an engine was about to move after having stood for a time in a stationary position, as upon the occasion here in question. Petitioner adduced positive testimony to that effect (R. 60, 61, 80, 93), and this was corroborated by respondent's star witness, Keeler (R. 134). It matters not that engineers did not always observe the rule. And such conflicts as there were in the evidence as to the custom and practice were for the jury. It follows that a jury could, with perfect propriety, find that when Tennant walked "around" the standing engine, to the rear end thereof (R. 196, 197), he was entitled to rely upon the observance of such rule, custom and practice. And Tennant being dead, in the absence of evidence to the contrary the presumption prevails that he did rely thereupon (Director General of Railroads v. Templin [3rd Cir.], 268 Fed. 483, l. c. 485).

During the period of five or ten minutes that the engine stood stationary after the switching had been com-

pleted on track B-28 and while the engineer was awaiting a back-up signal from the south end of the train, the engineer saw Tennant put his raincoat and hat in the compartment of the cab on the west side of the track and saw him then walk northward "around the engine," to the north or rear end thereof (R. 196). He did not return on the fireman's side (R. 219), and was never again seen alive. It appears that the Court of Appeals reached its said conclusion on the issue of proximate cause largely because no testimony could be produced as to Tennant's exact position and what he was doing at the very instant when the engine was suddenly put in backward motion without warning and he was run upon and killed. But it is clear that the lack of such testimony affords no sound reason for the Court's said conclusion, for any movement of the engine without warning was fraught with danger, and the evidence, with the inferences readily springing therefrom, amply warranted the jury in finding that Tennant, having gone around to the rear of this engine, and being then and there presumably in the performance of his duty as we shall show, was entitled to the protection designed to be afforded by the rule and custom and relied thereupon, and that the failure to observe the rule and custom proximately caused or contributed to cause his death. Recovery is not denied in cases of this character merely because the deceased did not have at hand an eyewitness to the casualty.

There was no such mystery as to Tennant's location when run upon as to effect petitioner's right to recover for his death, as the Court seems to have thought (R. 304, 305). Not only did the undisputed evidence show that a very short time before he was run upon and killed he went around to the north end of the engine, but the testimony as to the place where the engine then stood, and the place upon the track where Tennant was run upon, as shown by

the location of his severed right hand, cap, lantern and the pool of blood after the casualty, fully sufficed to warrant the jury in finding that when run upon he was at or about the north or rear end of the engine.

There was testimony that the hand, cap, lantern and the pool of blood were about the place where the engine stood after the coupling movement had been made (R. 58). According to the testimony of Harkless, who stepped off the distance, the hand, cap, lantern and pool of blood were about 300 feet south of B-28 switch (R. 89). According to testimony of respondent's witnesses the blood was 315 feet (R. 137) or 317.6 feet (R. 113) south of that switch. In the course of the coupling operations the engine had made a number of moves southwardly on track B-28. Harkless testified that the train had pushed **seven or eight car lengths** in coupling up that track (R. 89), a car being forty feet long (R. 197). The evidence as a whole obviously sufficed to warrant the jury in finding that Tennant was at or about the rear end of this engine when it was suddenly run upon him without warning.

What has just been said makes it quite clear that the learned author of the opinion of the Court of Appeals herein was not justified in proceeding on the theory that the blood on the track was found "a distance of from 80 to 120 feet south of where the engine stood prior to the fatal movement" (R. 307). That theory was based upon a bit of testimony of the engineer, a witness for respondent, that the engine, prior to the fatal movement, was standing five or six car lengths south of switch B-28 (R. 197, 307). That testimony is at variance with the testimony mentioned above showing that before the last stop the engine had moved **seven or eight car lengths south of B-28 switch.** And it is not in keeping with the engineer's own testimony that **on the last southward movement alone,** made to couple to the last group of cars that stood far

down track B-28, **the engine moved five or six car lengths** (R. 196); for in the course of the coupling work the engine had previously made two or three southward movements (R. 49, 228, 230).

And in reaching its said conclusion as to the issue of proximate cause, the Court of Appeals proceeded upon another untenable theory. The Court stated that "it is undisputed that the deceased at that time had no further duty to perform on or about the engine and that he was next required to be at switch 41" (R. 305), and that "there is no dispute in the evidence but that the deceased was not in the performance of any duty at the time of his death" (R. 306). **The record does not justify such statements.** There is nothing in the evidence to indicate that Tennant departed or stepped aside from the general course or line of his duty. And, as petitioner pointed out in her petition for a rehearing herein (R. 315, 316), respondent's own witnesses testified that it was Tennant's duty to remain with the engine and protect it and the train from the movement of any other train or any engines or cars on that track (R. 156, 166, 232). Such testimony went unnoticed in the opinion. While it appeared that it was Tennant's duty to timely proceed to switch No. 41 in another part of the yard and throw that switch after the train had been backed northwardly and westwardly, and was ready to be shoved from a lead track down track 41, it did not by any means conclusively appear that when the last coupling had been effected and the train stopped it became Tennant's duty to immediately abandon the engine and proceed to switch No. 41 while the train remained standing and while the engineer continued to look south for a backup signal; if, indeed, there may be said to be any substantial evidence to that effect. A jury could properly conclude that Tennant's duty to remain with the engine and protect it and the cut of cars from movements on that track continued, not only while

the coupling operations were in progress, but during the brief period thereafter when the train remained stationary and the engineer was engrossed in keeping a watch to the south for a backup signal, Tennant did remain with the engine. And since his lips are closed in death, in the absence of any evidence to the contrary, the law indulges the presumption that he was in the performance of the duty then and there resting upon him (New Aetna Portland Cement Co. v. Hatt [6th Cir.], 231 Fed. 611, 617). It matters not how he happened to be so situated as to be run upon. The presumption is that he was in the exercise of due care for his own safety; though such presumption is not here needed since contributory negligence would not bar a recovery under the act, and, for that matter, is not, under the pleadings, an issue in this case for any purpose.

It is submitted that under the evidence adduced a jury could well conclude that **a single tap of the bell of this engine would have sufficed to save Tennant's life; that his death proximately resulted from the failure of the engineer to take the trouble to reach for the bell cord when he was about to put the engine in motion, as was his duty.**

The questions before the Court of Appeals were, in our judgment, completely and properly resolved by the brief dissenting opinion of Judge Kerner herein as follows:

> "Any movement of the engine without warning was dangerous to life and limb. In addition to the fact that no bell was rung at the time the engineer started to move the engine and that he did not know where Tennant was, there was also evidence that it was the practice and custom not to move an engine when a member of the crew was missing unless the bell was rung as a warning before starting the engine.
>
> "I think it was permissible inference by the jury that the failure to sound the bell was the proximate cause of Tennant's death, and that the inference to be drawn from all the evidence as to the existence of

the custom, its purpose and the reliance which Tennant under all the circumstances was entitled to place upon it, was for the jury. Consequently, the judgment ought to be affirmed" (R. 309).

(5)

Upon the evidence in this record the ruling of the Court of Appeals complained of is plainly out of accord with the applicable decisions of this Court, some of which are: Tiller v. Atlantic Coast Line R. Co., 63 Sup. Ct. Rep. 444, 87 L. Ed. 446; New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892; Seago v. New York Central R. Co., 315 U. S. 781, 86 L. Ed. 1188, 62 Sup. Ct. Rep. 306, reversing Seago v. New York Central R. Co., 348 Mo. 761, 155 S. W. (2) 126; Myers v. Pittsburgh Coal Co., 233 U. S. 184, 58 L. Ed. 906; Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473.

In **Tiller v. Atlantic Coast Line R. Co., supra, 63 Sup. Ct. Rep. 444, 87 L. Ed. 446**, decided by this Court on February 1, 1943, the action was one under the Federal Employers' Liability Act to recover for the death of Tiller, who was a policeman for the defendant railroad company. While inspecting, at night, the seals on slowly moving cars on one track, Tiller was struck and killed by a train that was backed on an adjoining track in the yard; the space between the moving cars being three feet seven and one-half inches. There was no eyewitness to the casualty. The automatic bell of the engine backing the train on the adjoining track was ringing. The rear of that train was unlighted, though a brakeman with a lantern was riding on the side away from Tiller. No special signal or warning was given. In ruling that the case should have been submitted to the jury, this Court said:

"Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury

system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee etc. R. Co., 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478. Or, as we have put it on another occasion, 'Where the facts are in dispute and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury."

The opinion of the Court of Appeals in the instant case is plainly out of accord with this Court's decision in the Tiller case. In this case the evidence warrants a finding of negligence attributable to the defendant employer as for failure to warn of the impending movement, as did the evidence in the Tiller case—though the evidence of negligence is here more pronounced than in the Tiller case, since it does not appear that in the latter the failure to give a special warning was a violation of a rule or custom. And in this case the question whether the negligence of respondent's engineer proximately caused or contributed to cause the death rests upon inferences that a jury may lawfully draw from the evidence, as did that issue in the Tiller case. The Tiller case makes plain the unsoundness of the ruling of the Court of Appeals herein that, under the evidence here adduced, the jury should not have been permitted to pass upon that issue.

In **New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892**, the deceased, whose duty it was to lubricate and service engines in the defendant's roundhouse, was run over and killed by an engine that had been lubricated and serviced and was being removed from the roundhouse by an engine hostler. "There was no eyewitness to the accident" (281 U. S., l. c. 347). The deceased's body was found upon the track after the engine had passed over it. The hostler had sounded the engine whistle, but there was

a brief wait thereafter before the fatal movement. There was not a word of testimony as to what the deceased was doing or attempting to do at the precise instant of the casualty. He had no further duty to perform in connection *with that particular engine.* This Court, in an opinion by Mr. Justice Stone, now Chief Justice, held that the case was one for the jury, and, among other things (281 U. S., l. c. 349, 350), said:

> "Any movement of an engine without warning was dangerous to life and limb. After the hostler mounted the engine, and before it was moved, sufficient time elapsed for the deceased to come into proximity with it, which was dangerous if, as the jury might have found, he could not be seen from the engine cab by the hostler and was not warned of the impending movement. On the evidence it was for the jury to say whether petitioner exercised due care in moving the engine without a more specific and effective warning and whether failure to give it was the cause of the death."

By the same token, in the instant case the issues of negligence and proximate cause were for the jury. In the instant case, as said by Judge Kerner in his dissenting opinion, any movement of the engine without warning was dangerous to life and limb. Tennant could not be seen from the engine cab by the engineer and was not warned of the impending movement, despite the fact that the rule, custom and practice required such warning. It follows that the decision of the Court of Appeals herein is out of accord with the decision of this Court in the Marcone case.

In order not to further extend this brief we refrain from discussing other applicable decisions of this Court cited above. The cases relied upon by the Court of Appeals in its opinion (R. 307, 308) are, in our judgment, hege far afield. It is plain, we submit, that the effect of the ruling

of the Court of Appeals herein, that a jury may not be permitted to determine whether Tennant's death resulted in whole or in part from the negligence of respondent's engineer, is not only to deprive petitioner of a right accorded to her by the Employers' Liability Act, but to deny her the right of trial by jury vouchsafed to her by the Constitution of the United States.

Petitioner therefore prays that this Court issue its writ of certiorari herein, and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, rendered herein on the 31st day of March, 1943, and which became final by the overruling of petitioner's petition for a rehearing on May 13, 1943, be reversed.

Respectfully submitted,

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WILLIAM H. ALLEN,

Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

MARY TENNANT, Administratrix of the Estate of Harold C. Tennant, Deceased,
Petitioner,
vs.
PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation,
Respondent.

No. 1094. 94

PETITIONER'S REPLY BRIEF.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

MARY TENNANT, Administratrix of the Estate of Harold C. Tennant, Deceased,
Petitioner,
vs.
PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation,
Respondent.

No. 1084.

PETITIONER'S REPLY BRIEF.

I.

Respondent's argument in its brief in support of its contention that the evidence did not warrant the submission to the jury of the issue whether the engineer's negligence proximately caused or contributed to cause Tennant's death is plainly unsound. Such argument, properly analyzed, amounts to no more than a contention that **because no eye-witness could be produced who observed Tennant's exact position and what he was doing at the very instant when the engine was suddenly moved upon him without warning,** a jury may not be permitted to find that there was any causal connection between the failure to ring the bell and his injury and death. Such, in effect, is the ruling of the Court of Appeals herein. The unsoundness thereof readily

appears from the decisions of this Court in **Tiller v. Atlantic Coast Line R. Co., 63 Sup. Ct. Rep. 444, 87 L. Ed. 446**, and **New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892**, referred to in our original brief. In the Tiller case, as here, there was no eyewitness to the casualty, and hence no testimony as to Tiller's exact position or just what he was doing at the very instant he was struck, or how he happened to come upon or in dangerous proximity to the track upon which he was struck. A similar fact situation existed in the Marcone case.

In the instant case, after the last push of the engine to the south there was a wait of "five or ten minutes" (R. 197). And **after** this last push had been made and the engine had stopped, Tennant was seen by the engineer standing alongside of the cab, putting his raincoat under the cab in the box. After putting away his raincoat he took out his cap and jacket and put them on, and then walked "around" the engine to the front thereof (R. 196). What time he consumed in doing these things, before he reached the front of the engine, does not definitely appear, but obviously a jury could find that he was about the front of the engine for a very brief interval of time before it was put in motion, without warning, and he was there run upon and cut to pieces. Whatever may have been his exact position, and whatever he may have been doing or attempting to do at the precise instant, **it may be readily inferred that a sounding of the bell, as the rule required, would have saved his life.** As said by Judge Kerner in his dissenting opinion, "It was a permissible inference for the jury that the failure to sound the bell was the proximate cause of Tennant's death" (R. 309).

Respondent in its argument in its brief (pp. 27-29) advances one "conjectural possibility" after another as to what, it is said, Tennant may have been doing when run upon, none of which are supported by any evidence. Such fanciful hypotheses, so conjectured or imagined, can afford no ground for the reversal of a judgment that is supported

by the testimony. Terminal Railroad Association v. Farris (8th Cir.), 69 F. (2) 779, l. c. 785. One such conjectural hypothesis, which respondent in its brief (p. 28) says is "the strongest possibility in the case," is **directly contrary to the testimony**, namely, the theory that Tennant may have walked around the north end of the engine and back on the east side thereof and then sought to climb between the cars. Cole, the fireman, on cross-examination testified that during all of the wait mentioned he was on the east side of the engine keeping a lookout, and that **Tennant never walked past him** (R. 219, 220). The evidence, indeed, makes it entirely plain that Tennant went around to the rear, that is, the north end of the engine shortly before the casualty, did not return therefrom, and was run upon at that place. As pointed out in our original brief, it was his duty to remain with the engine and protect it and the cut of cars from other movements on the track (R. 156, 166, 232); and the presumption is that he was in the performance of that duty when killed. The evidence does not show that it was either his duty or his custom to leave the engine before the train was ready to start on its northern journey, as respondent argues. And whether, under the attending circumstances of fact, the failure to ring the bell proximately caused or contributed to cause his death was a question of fact for the jury whose finding thereon should have been allowed to stand by the Court of Appeals. Certainly it cannot be said that "all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." **Milwaukee & St. Paul R. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256; Story Parchment Co. v. Paterson Parchment Paper Co. et al., 282 U. S. 555, 566, 65 L. Ed. 544.**

In holding that a jury could not be permitted to find that the negligence of respondent's engineer in failing to ring the bell proximately caused or contributed to cause Tennant's injury and death **because no eyewitness could be produced who saw Tennant's exact position and precisely**

what he was doing at the time he was run upon, the ruling of the Court of Appeals is directly contrary to the decisions of this Court in Tiller v. Atlantic Coast Line R. Co., supra, 63 S. Ct. Rep. (2) 444, 87 L. Ed. 446; New York Central R. Co. v. Marcone, supra, 281 U. S. 345, 74 L. Ed. 892, and Myers v. Pittsburgh Coal Co., 233 U. S. 184, 58 L. Ed. 906, and to other decisions of this Court that were extant when the Court of Appeals promulgated its opinion herein, on March 31, 1943, and that had been called to the Court's attention, and is plainly out of accord with the decision of this Court in **Bailey v. Central Vermont Railway, Inc., 63 Sup. Ct. Rep. 1062, 87 L. Ed. 1030**, rendered on June 15, 1943.

In the **Bailey case**, supra (63 Sup. Ct. Rep. 1062), Bailey, who was in the employ of the defendant railway company as a section man, was engaged in opening the hopper of a car of cinders on a bridge by turning a nut with a wrench, there being a narrow footing at the side of the car and no guard rail. Upon his second attempt to turn the nut it spun, the hopper opened, and he fell to the ground below, a distance of some eighteen feet, sustaining injuries from which he died. This Court, in holding that the case was one for the jury, said:

> "The right to a trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' Jacob v. New York City, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166. **It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries.** That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has pro-

vided. **To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.**" (Emphasis ours.)

This Court's ruling in the Bailey case serves to make it all the plainer that under the evidence adduced the instant case is one for the jury, and that the ruling of the Court of Appeals that a jury may not be permitted to find, from inference arising from the evidence, that Tennant's death resulted in whole or in part from the failure of the engineer to ring the engine bell constituted a usurpation of the functions of the jury and operated to deprive this plaintiff of a right accorded to her by the Employers' Liability Act, namely, the right to have the issues of fact in such a case resolved by a jury and not by the Court of Appeals.

II.

Respondent in its brief further contends that the evidence did not suffice to take to the jury the issue of negligence on the part of respondent's engineer, and that therefore the decision of the Court of Appeals reversing the judgment below was right, though not placed upon that ground. But we submit that this contention is entirely unsound. No amount of argument can alter the fact that in this case respondent's engineer violated a clear and explicit rule of the company providing that "the engine bell must be rung when an engine is about to move" (R. 60, 61). As we have said, such a rule requires no construction, and of itself constitutes substantial evidence that reasonable care requires the caution that the rule directs; and it was respondent's duty to enforce the rule as written. Montgomery v. Baltimore & Ohio R. Co. (6th Cir.), 22 F. (2) 359. Nevertheless, respondent was permitted to introduce a mass of testimony as to what its assistant superintendent, Keeler, told its employees regarding the in-

terpretation or application of the rules and the custom and practice in the yard in regard to the ringing of the bell. Such testimony, if admissible at all, simply served to raise a conflict in the evidence, for petitioner adduced positive testimony that both the rule and the custom and practice required that the bell be rung when an engine was about to move after having stood for a time in a stationary position as upon the occasion here in question (R. 60, 61, 80, 93); and this was corroborated by respondent's witness Keeler on cross-examination (R. 134). It cannot be doubted that the issue of negligence in this case was one for the jury. As said in **Bailey v. Central Vermont Railway, Inc., supra, 63 Sup. Ct. Rep. 1062, l. c. 1064,** "to withdraw such a question from the jury is to usurp its functions."

The contention that the evidence showed, as a matter of law, that Tennant was guilty of negligence constituting the sole cause of his injury and death does not warrant discussion.

III.

Petitioner respectfully submits that this case is one calling loudly for the issuance by this Court of its writ of certiorari to bring the case here for review. Not only will the decision of the Court of Appeals herein, if allowed to stand, deprive this petitioner of the right to a trial by jury accorded her by the Employers' Liability Act and result in a gross miscarriage of justice, but an important question of law is involved which the Court of Appeals decided in a way not in accord with the applicable decisions of this Court and which may well seriously affect the administration of the law in other cases arising under the act. The rationale of the ruling of the Court of Appeals complained of is that because no eyewitness could be produced who observed Tennant's exact location and precisely what he was doing or attempting to do when run upon, there was a total lack of any evidence to support a finding that his death resulted in whole or in part from the failure of

the engineer to ring the engine bell. Such ruling is not only out of accord with the applicable decisions of this Court, but constitutes an erroneous interpretation of this Court's opinion in **Tiller v. Atlantic Coast Line R. Co., supra, 63 Sup. Ct. Rep. 444**, which the Court of Appeals had before it. We submit it should not be allowed to stand as a precedent. It is of the highest public importance that the rights accorded railroad workers and their dependents by the Employers' Liability Act be properly recognized and enforced by every court in the land in which an action may be brought under the act.

Wherefore, petitioner again prays that this Court issue its writ of certiorari herein, and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit herein be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1084 94

MARY TENNANT, ADMINISTRATRIX OF THE ESTATE OF HAROLD C. TENNANT, DECEASED,

Petitioner,

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF FOR RESPONDENT.

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vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF OF RESPONDENT.

Opinion of the Court Below.

The Opinion of the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Mary Tennant, Administratrix of the Estate of Harold C. Tennant, deceased, *vs.* Peoria and Pekin Union Railway Company, a corporation, is reported in 134 Fed. (2nd) 860. It also appears on pages 292 to 309 of the printed Record.

Jurisdiction of This Court.

Petitioner has filed its Petition for a Writ of Certiorari under Sec. 240, Judicial Code, as amended by Acts of Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Title 28 U. S. C. A., Sec. 347. This Court is being asked to issue its writ to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit, hereinabove designated.

STATEMENT OF THE CASE.

Petitioner has omitted so many salient elements of the case that it becomes necessary to supply the omissions so that this Court will be fully informed.

The Issues.

The Amended Complaint confined the charges of negligence to two specifications, (First) that the Respondent in the operation of its East Peoria yards had promulgated and adopted its Rule 30: "The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grades, and to prevent accidents", and that Defendant violated said rule by causing an engine to be moved without ringing a bell, which violation is alleged to have caused the death of Harold C. Tennant; and (Secondly) that Respondent failed to exercise ordinary care to ascertain the whereabouts of Harold C. Tennant while working about one of Respondent's trains as a member of the switching crew, and carelessly caused the engine and cars to be moved when the whereabouts of the said Tennant were unknown. (Rec. 2-4.)

The Answer filed by Respondent herein denied these charges specifically. (Rec. 6-7.) In the Respondent's response to a question for admissions of fact it was further denied that Rule 30, aforesaid, was in force in Defendant's East Peoria yard for the purpose of causing locomotive bells to be rung to warn switchmen employed in duties similar to those of Tennant at the time of his death. (Rec. 15.)

The Court below found that the case was submitted to the jury solely upon the first charge of negligence; that no request was made for submission upon the second charge, and that no complaint of the Court's action was in this

respect shown. (Rec. 293, 308.) Petitioner does not charge the Circuit Court of Appeals with error in this regard in the Specifications of Error, and hence the aforesaid second charge of negligence is not in the case. The defense of assumed risk was not made in this case.

The Facts.

Petitioner omitted to show this Court the other rules which are in the record and which were in full force and effect in the East Peoria yards of Respondent at the time of the accident. Rule 32 provides: "*The unnecessary use of either the whistle or the bell is prohibited.*" (Rec. 117.) The General Rules to employees provide:

> "They must expect trains to run at any time, on any track, in either direction."
>
> "*They must not stand on the track in front of an approaching engine or car for the purpose of boarding the same.*" (Rec. 117.)

Rule 702 provides in part as follows:

> "All employees will be expected to use the utmost care in coupling or uncoupling cars or engines to guard against personal injury and destruction of property, *and are positively forbidden to go between the cars while in motion to adjust coupler or knuckle or for any other purpose.*
>
> "It is alike dangerous to assume that signals given to the enginemen or firemen have been seen and, if seen, will be obeyed—when obedience to those signals on the part of those enginemen and firemen is essential to the safety of an employee in the performance of his duty. *He must know that the signal has been seen, understood and obeyed before placing himself in a dangerous position;*"

The Peoria and Pekin Union Railway Company is a switching railroad, extending between Peoria and Pekin, Illinois. It operates yards in East Peoria extending in a southerly direction from Washington Street, in East

Peoria, to what is known as Wesley, a distance of about 6,000 feet, these yards being divided into two parts, one known as "A" yard and one as "B" yard, the "B" yard being on the north end, and each yard having 42 tracks. (Rec. 108.) They are separated by ladder tracks, and each of the 42 tracks connect with these ladder tracks. At the north end of "B" yard there are also lead or ladder tracks and each of the 42 tracks of that yard connect therewith. (Rec. 109.) One of the lead tracks at the north end of "B" yard extends north across Washington Street to the various industries, and this is called the industrial lead. (Rec. 109.) The other lead is known as the Nickel Plate lead, also extending across Washington Street and connecting with the T. P. & W. and Nickel Plate main tracks. (Rec. 109.) The Respondent has a number of tenants which use its rails and bring their trains into the East Peoria yards, these being the C. & I. M., the Illinois Central, the Peoria & Eastern, the Nickel Plate, Pennsylvania, the Chicago & Alton and the Northwestern. (Rec. 109.) They uncouple their engines from their trains and the Respondent with its engines and crews breaks up these trains and classifies the cars into various tracks. Thereafter the Respondent switches these cars to their destinations and also makes up outgoing trains for said tenants in the East Peoria yards. (Rec. 110.) It is undisputed that the East Peoria yards is a place of intense switching activity. At times there are as many as eight or ten engines working close together along the leads and inside tracks. Constant ringing of bells would tend to confusion. (Rec. 127.) There are no public road crossings over "A" or "B" yard. In fact, there are no crossings between Washington Street in East Peoria and the Wesley crossing, about two miles south thereof. (Rec. 121.) Track "B-28" (where the accident occurred) is one of the tracks of "B" yard and connects with the northerly diagonal lead tracks through "B-28 Inside Switch". A track called the "30

Lead" extends from the "B-28 Inside Switch", proceeds in a northwesterly direction through a puzzle switch, and connects with the industry lead. (Rec. 111.) The "30 Lead" connects with all the tracks from "B-28" to "B-42". Track "B-41" connects with this lead at "41 Switch", a considerable distance north and west of "B-28 Inside Switch". This is all shown upon a map introduced in evidence as "Defendant's Exhibit 2", but it is not known whether this map has been brought before the Supreme Court with this record.

On July 12, 1940 it was the duty of Tennant's crew to move a cut of cars, previously classified on track "B-28", to the repair track "B-41". This switch movement was a nightly occurrence, done as a routine matter by the same crew every night. (Rec. 116.) This crew had what was called the East Peoria industry assignment, with various routine jobs to perform every night. They went on duty at eleven o'clock in the evening and went off at seven o'clock in the morning. One job was to take industrial cars to Caterpillar Tractor Co. and other plants in East Peoria. Another was to take cars which had been collected in "B" yard for interchange with the T. P. & W. railroad. (Rec. 227.) Switchman Bonner, fieldman of Tennant's crew, testified that there was nothing unusual or difficult about the switching operation in taking the cars from track "B-28" and moving them to the repair track; that it was always handled in virtually the same manner. (Rec. 227.)

Harold C. Tennant entered service as a switchman for the Respondent on August 1, 1936. (Rec. 120.) He had previous service with the C. B. & Q. at Creston, Iowa. (Rec. 121.) He was instructed and examined as to the rules of the Respondent, their meaning, interpretation and application at the time of his employment. At that time Rules 30 and 32 were explained to him and he was told that they were to be read together. (Rec. 121.) He was

again examined and instructed in the rules in November, 1939. *At that time witness Keeler, Assistant Superintendent, again explained to him that Rules 30 and 32 were taken together and that in yard switching in the East Peoria yards engine bells would not be rung for the purpose of warning members of the crew, unless an engineer knew a crew member to be in danger.* (Rec. 122.) All engineers and switchmen were instructed as to the meaning of these rules. (Rec. 119.) Keeler further testified that these men were told that under Rules 30 and 32 it was not necessary that the bell be rung every time an engine was started on a track for the reason that each crew member was supposed to watch the movements of his own engine, that if all the engines about the yard rang the bell every time they stopped and started, the bell would lose any virtue it had as a warning to any one who might be on or about the tracks. Keeler further testified that he told the men it was not necessary to ring the bell in yard switching unless there should be some car men, section men or some one like that about the track, since all members of the switching crew were expected to know what movements were being made and to provide for their own safety. (Rec. 121.)

"Q. Are the switchmen told that the bell would not be rung to warn switchmen who are working on the crew of that particular engine?

A. Those instructions are it is not necessary to ring the bell under those conditions.

Q. Isn't it a fact that the men are told that engineers operating the switch engines in East Peoria will not ring the bell unless they know somebody is in danger?

A. They are told and instructed to that effect.

Q. But ordinarily, unless the engineer knows somebody is in a position of danger, the bell will not be rung?

A. No.

Q. Is that what the men are instructed?

A. That is the instruction.

Q. Are they instructed that rules 30 and 32 are considered and read together?

A. They are read together." (Rec. 119-120.)

"Q. What did you tell Harold C. Tennant with reference to rules 30 and 32?

A. I told him those rules were to be read together, and that our instructions were it was not necessary for an engineer or fireman to ring a bell every time an engine started and stopped, but were required to ring the bell when passing over road crossings or along repair tracks, or where men were working and the bell was used as a warning." (Rec. 121.)

Keeler was thereafter asked what he had explained to Tennant the second time he examined him on the rules, as follows:

"Q. Was it explained to him in yard switching in the East Peoria yards that engine bells would not be rung for the purpose of warning members of the crew unless the engineer knew the crew members were in danger?

A. It was.

Q. When you discussed rules 30 and 32 with Tennant, did he acknowledge he understood them?

A. He had the proper understanding, or else I would not have permitted him to go to work." (Rec. 122.)

About seventy-five per cent of Tennant's work was in the East Peoria yards. The entire month of June and the month of July, up to the time of his death, was entirely in said yards. (Rec. 123.)

In the month of March, 1940 he worked on this same East Peoria industry assignment the 7th, 17th, 19th and 20th. In April, 1940 he worked on this same assignment on the 10th, 11th, 12th and 13th. In the month of May, 1940 he was on the same industry assignment the 14th, 15th, 16th, 18th, 20th, 21st, 22nd, 23rd, 25th and 29th under Foreman Harkless and engineer England. (Rec. 123-124.)

In June he was on this assignment the 1st, 5th, 6th and 8th, and in July he worked on it the 9th, 10th and 11th, with Harkless as his foreman and England as his engineer. (Rec. 124.) Prior to this time he had worked with engineers Wiedeman, Coon, Pratt and Bruning, all of whom had been locomotive engineers for more than twenty-five years. (Rec. 140-152.) They had all been instructed in the rules of the Respondent and had had occasion to observe the practices and customs of switching in the East Peoria yards. Engineer Wiedeman testified that under Rules 30 and 32, as he was instructed in them, and as they were carried out, bells should not be rung on locomotives in the East Peoria yards unless the engineer knew that some one was in a position of danger; that he worked nights most of the time, and that he never rang the bell unless he saw somebody in between the cars or at crossings; that that was the only time they rang the bell at night. (Rec. 141-142.)

Engineer Coon, with twenty-eight years of service, stated that under the rules bells were not rung in the East Peoria yards for the purpose of warning members of his own crew not known to be in a position of danger; that this applied not only during operations in coupling up cars on tracks, but also when moving cuts of cars out onto the lead. (Rec. 145.) Engineer Pratt, with thirty years' service, had observed the customs and practices of operating switch engines in the East Peoria yards, and had been examined with reference to the rules. He considered Rules 30 and 32 as being together and that under these rules, and from his observation, bells were not rung in said yards when cars were being coupled up or moved out onto a lead for the reason that there is continual switching and the bells would cause confusion. (Rec. 148.) Pratt further testified that every member of a switching crew has certain definite duties, and he is supposed to know what those duties are; that the engineers assume that each

man is doing his duty and that one of them is to keep alert and keep clear of danger. There is no practice in the East Peoria yards requiring an engineer to look around to see where the members of his crew are before he can move his engine, and a bell is not rung for a crew unless it is actually known that he is between the cars or is in a position of danger. (Rec. 148-149.) Engineer Coon further testified that the mere fact that a pinpuller (which was Tennant's job on the night of the accident) gets out of sight of the engineer, is no indication that the man is in a position of danger. He is to protect his own safety in that case, and the engineer assumes that he is performing his regular duties and keeping alert for his own safety. (Rec. 151.)

All these engineers testified that there was no practice in the East Peoria yards that an engine must stand still until the engineer discovers the whereabouts of every member of the crew, but, on the contrary, that they moved their engines upon signal, since the crew members were familiar with the movements and were assumed by the engineers to be looking after their own safety. (Rec. 148, 149, 151, 169.)

Tennant had also worked with Foremen Stringer and Hancock. (Rec. 155, 164.) Stringer testified that in switching in the East Peoria yards, under Rules 30 and 32, an engineer does not use a bell or whistle if he does not know that a member of the crew is out of place or in a position of danger. (Rec. 154.) Foreman Hancock testified that a bell might be rung in the East Peoria yards for the purpose of warning section men or anybody who was not part of the crew, but that the bell was not rung for the purpose of warning the crew members. (Rec. 162.) Stringer explained that an engineer does not see all members of his crew at all times when working in the leads or in the yards in East Peoria; that there are quite a number of times when a man will be on top of a car and the man

close to him will take care of him; that another member may be out performing his duties some place else, lining switches for the current movement of the train; that the mere fact that an engineer does not see all the members of his crew, after he gets a signal to move, does not signify that anybody is in a position of danger; that the practice of switching in the East Peoria yards is that unless the engineer has positive knowledge that some member of the crew is in a position of danger, he moves the engine. (Rec. 155.) That it is only when a member of the crew happens to step in between cars, in which case the engineer knows he went between the cars, that the bell or whistle is used. (Rec. 154.) Numerous other witnesses testified to the effect that Rule 32, prohibiting the unnecessary use of the bell, qualified Rule 30 insofar as yard switching was concerned and prohibited the use of the bells when starting engines for the purpose of warning crew members, unless the engineer knew such crew member to be in danger and oblivious to the movement of the engine. (Rec. 171, 178.)

T. R. Beach, trainmaster of the Illinois Central Railroad, was familiar with operations in the East Peoria yard and he had observed that the bell was never rung unless an engineer saw some one on the track in danger. Momentary stopping and starting of engines did not cause the engineer to ring the bell. (Rec. 184.)

Harkless was the only witness called for the Plaintiff regarding operations in the East Peoria yards. He was the foreman of Tennant's crew on July 12, 1940, but was no longer in service with the company at the time he testified. Subsequent to the accident and prior to the time of his testimony he had been in a fracas with the night yardmaster and had been disciplined by being reduced from a foreman to a switchman, and admitted that he was "sore". (Rec. 73-75.) He had an unsettled claim against the company (Rec. 71-72), and he had taken Mrs. Tennant to Attorney Eagleton in St. Louis. (Rec. 72-73.) At the time of the

accident he was twenty car lengths or eight hundred feet away. (Rec. 79.) He did not know of his own knowledge how Tennant was injured. (Rec. 87.) He admitted that Tennant was an experienced man and that it was a routine job every night to enter track "B-28", pull out the cars that were in there and take them over to track "B-41". Tennant had worked with him on that routine job many times before as pinpuller and he was familiar with the job. (Rec. 77.) He admitted that in coupling up groups of cars on a track, it was not the practice to ring the bell. (Rec. 81.) His own engineer, England, never rang the bell while trains were being coupled up. (Rec. 81.) He was in charge of the cut and in charge of England, and Harkless admitted that he was used to the fact that the bell was not rung by England. (Rec. 81.) *Harkless admitted that when cars were pulled out of a track onto the lead, England only rang the bell to warn crews of other engines or pedestrians, or yard clerks, that the men on his crew knew all about the movement.* (Rec. 83-84.) He had observed that some engineers rang bells and that some didn't. (Rec. 81.) He did not say they rang bells to warn their own crew members.

Harkless further testified that after the cars had all been coupled together on track "B-28" at the time and place in question, he gave a back-up signal to the engineer. (Rec. 79.) He did not see Tennant any place. (Rec. 80.) He said that Tennant had two duties to perform, one being to see that the switches were lined up so that the train movement could go out on track "B-28" and get onto the lead, and that the other duty was to keep alert and look out for his own safety. (Rec. 80.) Harkless said that on the straight tracks in the East Peoria yards the foreman usually signaled direct to the engineer so that there was no necessity to relay the signal through Tennant. (Rec. 85.) The engineer did not have to have that signal relayed to him by the pinpuller Tennant. (Rec. 85.) Harkless did not know

how Tennant was run over since he was twenty car lengths away. If Tennant had been standing at the side of the engine, Harkless could have seen his light, but did not see it. (Rec. 85.) He said that the handholds on the footboard of the Diesel were in good condition. (Rec. 86.) There was a place on the top of the drawhead of the Diesel where a man could sit down, but that was not a proper place for a man to sit. (Rec. 86.) Tennant, he said, could have walked all the way around the north end of the engine and attempted to climb back through the cars. (Rec. 86.) He further admitted that the engineer always released the air on the Diesel before it started, and that it would make a whizzing sound, so that any one standing around the engine could hear it. (Rec. 87.) This hissing sound could be heard a car length away. (Rec. 88.)

Fireman R. E. Cole and switchman Charles W. Bonner, the other members of Tennant's crew, all testified that under the rules of the company, the instructions thereunder and the customs and practices of switching in the East Peoria yards thereunder, engine bells were not rung for the purpose of warning men performing the duties of Tennant, unless such man was known by the engineer to be in a position of danger. (Rec. 191, 214, 226.)

Engineer England testified that on the night in question one of the routine jobs was to pull the cars that had been placed on track "B-28" and place them on track "B-41". (Rec. 193.) The engine came into "B-28" from the north, the engine being headed south, with Tennant riding on the front footboard. Tennant lined all switches to get them in there. (Rec. 194.) The first car on the track was about one car length from the "B-28" switch, and Tennant made the coupling onto that car. (Rec. 194.) Harkless and Bonner walked south along the west side of track "B-28". Thereafter followed a number of movements forward and backward until all the cars were coupled up on track "B-28". (Rec. 195-196.) After the cars were all together

on the track, England saw Tennant standing on the west side of the engine putting his raincoat into a box or compartment underneath his cab window. Thereafter Tennant walked around the engine and that was the last England saw of him. (Rec. 196.) He walked around the north or rear end of the engine. (Rec. 196, 197.) England further testified that after Tennant had made the first coupling, he had no further duties to perform with reference to coupling up the track, that after he walked around the engine he had to go out on the lead and find out whether the switch was lined up for the next movement. (Rec. 197.) At this time England thought the engine was five or six car lengths in from the "B-28" switch. (Rec. 197.) England then testified that after Tennant had walked around the end of the engine and out of his vision there was a wait of about ten minutes; that it was ten minutes after he last saw Tennant. (Rec. 197.) During this time he continued to look south along the west side of the train for signals. (Rec. 197.) (Attention is here called to the fact that in Petitioner's statement of fact counsel stated that it was *during* this interval of time that Tennant was last seen alive. Actually *the ten minutes began*, under the testimony, when Tennant walked away.)

It was intended that these cars should be taken to track "41", and it would be necessary to pull back about twenty car lengths. (Rec. 197.) England stated it was the routine thing on all previous nights for Tennant to walk around the north end of the engine just the same way, and when they pulled up on the lead track over "41" switch and got ready to shove down into that track, they always found Tennant there at the "B-41" switch. England said that at the time and place of the accident that Tennant was not on either footboard. England, on cross-examination, stated that it was always his practice before starting his engine to look around to ascertain if any one was in danger, and that on this occasion, before he started his engine, he looked

from the cab of his engine and saw nobody on either the front or rear footboards. (Rec. 200.) Tennant, he said, did not ordinarily ride up to the "41" switch, but that he would walk away and walk down to the switches. (Rec. 200.) When England saw Tennant walk around the engine he thought he had gone to the "41" switch, thought he had walked down to that switch, and he did not consider him a missing man. (Rec. 213.) A missing man on a crew is somebody who had gotten down underneath the cars and is not performing his duty, or has gone off. (Rec. 213.)

Engineer England further testified that he received a back-up signal from the rear end of the cut, and after looking to see whether any one was in danger (Rec. 200), backed up, out onto the lead, some twenty car lengths, over "41" switch, so that the rear car would clear said switch. (Rec. 197, 198.)

Fireman Cole was seated on the east side of the cab. All signals, he said, were being given from the other side, the other members of the crew being supposed to be on the west side of the train. He said that he did not see Tennant walk around on his side while the train was standing still, but that he was not looking all the time. (Rec. 217.) After the engine finally started off, backing the cars out of the track that night, he then kept a lookout. (Rec. 217.) He did not see the signal given to England. The engine bell was not ringing as the cars started to move back onto the lead, but there was nothing unusual about that. (Rec. 218.) Cole did not see Tennant as the train started to move out and does not know how he was killed. He heard no shouts or outcries of any kind. (Rec. 218.) There was no rough or unusual start and the lights were burning. (Rec. 218.)

Bonner, the fieldman, had coupled up all the cars in the cut except the first car, which was coupled by Tennant. Bonner saw Tennant make the first coupling and noticed that he was still on the front footboard of the engine after

the coupling had been made. Bonner then walked down to make a coupling between the second and third cars from the engine, but Tennant was not down there with him. The men were using lanterns. (Rec. 229.) At the time it was necessary to shove down the track to couple onto the remaining cars on the track Bonner looked back toward the engine, but did not see Tennant, although he had a lantern. (Rec. 230.) After all the cars were together and after Bonner had released the brakes, he went to the rear end of the cut, waiting for the foreman who was making a list of the cars. At that time he looked back toward the engineer, but saw nothing of Tennant or his lantern. Tennant's duties, he stated, at that time were to attend to the switches and protect the cut. (Rec. 232.) He had a further duty of taking care of himself. (Rec. 232.) There was no necessity for him to relay any signals which might be given to the engineer by Harkless or himself, because this was a straight track and where the engineer could see there was no necessity for relaying any signal through the pinpuller. Bonner did not know how Tennant was killed. He did not see it. (Rec. 234.)

The facts of the discovery of Tennant's body after the accident were substantially as set forth in Petitioner's statement of facts on pages 7-8 of the Petition. The actual cause of Tennant's death was unknown and has since remained a mystery. There were no eyewitnesses and only conjectures or surmises have been advanced as to the cause of death, which will be discussed subsequently in this brief. The first evidence of blood was found on the rail 317.6 feet south of the switch point of "28 Switch", as measured by Chief Engineer Thornberry. (Rec. 113.) Keeler testified that this blood was on the outside of the ball of the west rail. (Rec. 137.) Near this blood was found Tennant's right gloved hand between the rails, with the handle of his lantern, still burning, about an inch from the fingers. Just beyond the hand there was a galvanized steel spring

about two inches in diameter and ten inches long. It was a bright, shiny object and showed up quite plainly. (Rec. 137-138.) Keeler further testified that he inspected the footboards of the engine and the safety appliances, grabirons and handholds, and found that they were all in good condition. He examined the wheels of the cars very carefully and on the outside rim of the north wheel, on the third car from the engine, he found a bit of flesh. (Rec. 138.) He found no evidence of blood on any of the wheels of the Diesel and no evidence of blood on the wheels of the first or second cars to the engine. It was not until he got to the third car from the Diesel that he found evidence of flesh. (Rec. 138.) There was evidence by witness Burch that he had noticed the habits of Tennant while working in the East Peoria yards prior to this accident, that Tennant had a habit of climbing up on the pilot beam of the engine. Burch stated that there is a footboard and handholds and grabiron and there is also a pilot beam. The footboard is placed there for men to stand on, with handholds so a man can stand securely. The pilot beam, however, is a dangerous place for a man to sit. He might slip in getting up there or he might slip in getting down. It is a high perch. If a man got up there and dozed off and the engine started he could fall off very easily. (Rec. 175.)

As we have said before, this statement of facts has been made by Respondent to supply omitted evidence which Petitioner failed to present to the Court.

On the trial of the case in the District Court, motions for a directed verdict were made at the close of Plaintiff's evidence, and again at the close of all the evidence. Both were overruled. The Trial Court refused to give any of the interrogatories tendered by Respondent. (Rec. 249.) These were set forth on pages 261-3 of the record and were tendered pursuant to Rule 49-b of the Federal Rules of Civil Procedure in connection with the motion for directed verdict. The purpose of this Rule was that the

Court might determine if the answers to the interrogatories were harmonious with such general verdict as might be brought in, in which event the Court could direct the entry of an appropriate judgment. Had the Court given these interrogatories, the jury would have been required to determine specifically the various questions of fact and whether the allegations of the Amended Complaint had been proved, and by the answers of the jury to these interrogatories, the Trial Court would have known what consideration had been given thereto. We believe that Rule 49-b was included in the Rules of Civil Procedure for a definite purpose. Thereafter the Trial Court charged the jury but adopted a prejudicial method of giving all Defendant's instructions *first* and all Plaintiff's instructions *last*. Some of Plaintiff's instructions were clearly erroneous, and these points were made to the Circuit Court of Appeals, which did not find it necessary to pass upon them. The question of the excessive amount of the verdict under the facts of contribution in the case were also preserved in Respondent's appeal from the Trial Court, although this was not passed upon. A motion was made in the Trial Court, after a verdict, for judgment notwithstanding the verdict, or in the alternative, for a new trial. This was overruled by the Trial Judge without stating reasons therefor. Appeal was perfected to the United States Circuit Court of Appeals for the Seventh Circuit, and it is from the decision of that Court, reversing the judgment of the Trial Court, with directions to enter judgment in favor of the Defendant, that the Petition for Writ of Certiorari is sought.

SUMMARY OF THE ARGUMENT.

I.

A.

Where there is an absence of direct evidence upon the cause of death and the circumstances give rise to a number of conflicting theories or possibilities of the cause of the injuries, for some of which the employer is not responsible, a jury will not be permitted to exercise conjecture or speculation in determining which theoretical assumption of facts might have been the effective cause of death. To recover, Plaintiff is not only required to prove that the railroad was negligent, but that the injury resulted proximately from that negligence.

Pennsylvania R. Co. v. *Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391.

Patton v. *Texas & P. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275.

Gulf, M. & N. R. Co. v. *Wells*, 275 U. S. 455, 48 Sup. Ct. 151.

Atchison, T. & S. F. Ry. Co. v. *Toops*, 281 U. S. 351, 50 Sup. Ct. 281.

Reading Co. v. *Boyer*, 6 Fed. 2d. 185.

Brennan v. *Baltimore & O. R. Co.*, 115 Fed. 2d. 555, (Certiorari denied, *Brennan* v. *B. & O. R. Co.*, 312 U. S. 685, 61 Sup. Ct. 614).

Willis v. *Pennsylvania R. Co.*, 122 Fed. 2d. 248, (Certiorari denied, *Willis* v. *Pa. R. Co.*, 314 U. S. 684, 62 Sup. Ct. 187).

Deere v. *Southern Pacific Co.*, 123 Fed. 2d. 438, (Certiorari denied, *Deere* v. *Southern Pac. Co.*, 315 U. S. 819, 62 Sup. Ct. 916).

The Federal Employers' Liability Act does not make an employer an insurer of the safety of its employees, but to entitle plaintiff to recover the defendant must have been guilty of some act of negligence which was the proximate cause of the injury.

Reese v. *Philadelphia & R. R. Co.*, 239 U. S. 463, 36 Sup. Ct. 134.

Wheelock v. *Freiwald*, 66 Fed. 2d. 694.

A mere scintilla of evidence is not sufficient to sustain a verdict in favor of a plaintiff, but the evidence must be substantial, not vague and uncertain.

Pennsylvania R. Co. v. *Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391.

Commercial Casualty Ins. Co. v. *Stinson*, 111 Fed. 2d. 63, (Certiorari denied, *Stinson* v. *Commercial Casualty Ins. Co.*, 311 U. S. 667, 61 Sup. Ct. 25).

Suggestions of counsel, however plausible, cannot take the place of evidence.

United States v. *Coal Cargo*, 11 Fed. 2d. 805, (Certiorari denied, *United States* v. *Cargo*, 273 U. S. 696, 47 Sup. Ct. 92).

Evidence, "however slight", is not sufficient to present a jury question. Where the evidence on one side is overwhelming, so as to leave no doubt as to facts, the court should give a peremptory instruction to the jury.

Gunning v. *Cooley*, 281 U. S. 90, 50 Sup. Ct. 231.

Where a court is left without knowledge of a fact after exploring every channel of information, it must decide against the litigant who counts upon the fact as an essential of this claim.

Shapleigh, et al. v. *Mier*, 299 U. S. 468, 57 Sup. Ct. 261.

B.

Where an injured person is not a member of the class of persons for whose benefit a warning signal should be given, he cannot recover because of a failure to give such signal.

Chesapeake & Ohio Ry. Co. v. *Nixon*, 271 U. S. 218, 46 Sup. Ct. 495.

Chesapeake & Ohio Ry. Co. v. *Mihas*, 280 U. S. 102, 50 Sup. Ct. 42.

Central Vermont Ry. v. *Sullivan*, 86 Fed. 2d. 171.

Norfolk & W. Ry. Co. v. *Gesswine*, 144 Fed. 56.

It is not negligence *per se* for an engineer or fireman, who have no notice that a crew member has placed himself in a dangerous position, not to warn him by signal.

Douglas v. *Washington Terminal Co.*, 298 Fed. 199.

Mullin v. *Louisville & N. R. Co.*, 261 Fed. 156.

It is not a dangerous practice *per se* not to ring bells in railroad yards where switch engines are moving back and forth and the bells and whistles would tend to confusion.

Aerkfetz v. *Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835.

Under the evidence, crew have right to assume employee will observe due care, where under the evidence he knew the practices of switching.

Toledo, St. Louis & W. R. Co. v. *Allen*, 276 U. S. 165, 48 Sup. Ct. 215.

II.

There can be no recovery under the Federal Employers' Liability Act for injuries resulting solely from the employee's negligence; nor can there be recovery where an employee, with liberty of action in the performance of a duty by him, neglected the same, or adopted an unsafe way when a safe way was open to him, or voluntarily violated rules promulgated for his own safety and to prevent the very accident which occurred.

Davis v. *Kennedy*, 266 U. S. 147, 45 Sup. Ct. 33.

Unadilla Ry. Co. v. *Caldine*, 278 U. S. 139, 49 Sup. Ct. 91.

Deere v. *Southern Pacific Co.*, 123 Fed. 2d. 438, (Certiorari denied in *Deere* v. *Southern Pacific Co.*, 315 U. S. 819, 62 Sup. Ct. 916).

Willis v. *Pennsylvania R. Co.*, 122 Fed. 2d. 248, (Certiorari denied in *Willis* v. *Pennsylvania R. Co.*, 314 U. S. 684, 62 Sup. Ct. 187).

Gilbert v. *Burlington C. R. & N. Ry. Co.*, 128 Fed. 529.

ARGUMENT.

I.

The opinion rendered by the United States Circuit Court of Appeals for the Seventh Circuit in this case (Rec. 292-309), reported in 134 Fed. 2d., page 860, indicates that the record was painstakingly analyzed by that Court. Judge Major stated that he considered the proof in the light most favorable to the Plaintiff. The facts were discussed in the decision in great detail, and it was even said that the Court ignored the testimony of Defendant's witnesses, except wherein some admission was made which Plaintiff relied upon as favorable. On the issue of negligence concerning Defendant's failure to ring the bell, pursuant to Rule 30 (which that Court held to be the only issue in the case, and which finding is not complained of here), the Court stated *that the proof was overwhelming* that Rule 30 had long been interpreted not to apply to a member of the switching crew unless he was *known* to be in a position of danger; that to the same extent it was likewise shown that this was the custom and practice not only of Tennant's crew, but of the other switching crews operating in the East Peoria yards. Nevertheless, the Court concluded that under recent decisions of this Court, *Seago, Admx.* v. *N. Y. Central R. R. Co.*, 315 U. S. 781, and *Tiller, Executor, etc.* v. *Atlantic Coast Line R. Co.*, 63 Sup. Ct. 444, proof of negligence, however slight, is sufficient to present a jury question.

Respondent does not believe that this Court, in the decisions just mentioned, intended to abrogate or rescind the long standing Federal Rule that "slight" evidence, or a mere "scintilla" of evidence, is insufficient to make a jury question, and that the evidence to support the allegations

of a complaint must be "substantial". The Circuit Court of Appeals, in its anxiety to resolve every possible implication in favor of Plaintiff, even after finding the evidence to be overwhelming against Plaintiff's contentions, was still constrained to say that a "slight" implication of negligence would have justified submission to the jury. This demonstrates that the Court below was more than fair, went further than the rules long established by this Court in scrutinizing and determining Plaintiff's right to trial by jury.

Thus far the Circuit Court of Appeals was able to go and no further when it came to the issue as to whether an alleged act of negligence was the proximate cause of the accident and whether the alleged failure to ring a bell had actually been the cause of Tennant's death. It was forced to conclude that the record was totally wanting in evidence to establish such causal connection. On page 307 of the Record the Court finally said:

> "We think we have sufficiently discussed the various theories as to the cause of the decedent's death, particularly plaintiff's theory, to demonstrate that it is shrouded wholly within the realm of speculation and conjecture."

And on page 309 of the Record the Court concludes:

> "We therefore must conclude that there is no substantial proof in support of the charge that defendant's failure to ring the bell was the proximate cause of the death of plaintiff's intestate and that the court should have directed a verdict in favor of the defendant, or allowed defendant's motion for judgment, notwithstanding the verdict."

There are, of course, two elements to be affirmatively proved by Plaintiff in a suit for damages under the Federal Employers' Liability Act: First, the Plaintiff must prove by substantial evidence the existence of some duty owed by the employer to the injured employee and negligent violation of said duty. Secondly, the Plaintiff must

prove by substantial evidence that he act of negligence was the proximate cause of the injury. *Proof of negligence alone is not sufficient.* This is the type of case, under the decisions of this Court, where it is impossible to say from the evidence what was the effective cause of the fatal injuries without complete resort to speculation, surmise and guesswork, upon which grounds a verdict will never be permitted to stand. These cases will shortly be discussed. First let us analyze the evidence and the theories and the conjectures which are all that this Court has before it upon the question of probable cause.

Engineer England was the last man of the crew to see Tennant alive. He saw him put his raincoat into the box immediately below his cab, on the west side of the engine, and then walk out of his vision around the north or rear end of the Diesel. On all previous nights, when they had been working together, and the number of times was considerable, being at least twenty times, Tennant had always walked around the north end of the engine in the same manner during this routine switching operation on track "B-28". Thereafter, on all previous occasions, England would receive a direct signal from the rear end of the cut, reverse his engine, pull out through "B-28" switch onto the lead and continue until the rear car had cleared "B-41" switch. Tennant, on all previous occasions, was at said switch, and, according to England, always walked up there. On the night of July 12, 1940 Tennant obviously did not pursue his usual custom and practice, but elected to remain somewhere in an unknown position in or around the north end of the cars, which had been collected together on track "B-28". After England last saw him there was a ten minute wait, during all of which time neither engineer England, fireman Cole, fieldman Bonner nor foreman Harkless saw Tennant. All of them have testified that they believed Tennant was performing his duties. England thought he had followed his practice of previous nights in

walking up along the lead to see that switches were lined and to wait for the cut at switch "B-41". Harkless said his duties were to walk back and see that the switches were lined or stay with the engine and observe care for his own safety. (Rec. 84.) It is patent that he did none of these things. Had he remained with the engine and observed care for his own safety, he properly could have remained on the ground, outside the rails, along the west side of the engine, where he could observe signals and where the other members of the crew could observe him. We know he did not stand there because no one saw him, although they looked in that direction at the time the signal was given for the train to pull out, and did not see him. Likewise, Tennant could have stood safely upon the rear footboard of the locomotive, where there were adequate handholds. Here too he could have observed signals on the west side of the cut and could have known when the signal to reverse the train was given. He did not do this because England has testified that he was not on the rear footboard, although he looked to see. (Rec. 200.) Nor did Cole see Tennant on his side of the engine when the train movement started, although he was keeping a lookout at that time. There is *no* evidence in the record as to what Tennant was doing or where he had stationed himself, or whether he was standing up or sitting down, or whether he was asleep or awake, or whether he was in back of the engine, or elsewhere.

Counsel for Petitioner seeks to substitute for this absence of proof his own hypothetical statement. He argues that because of the death of Tennant and the absence of eyewitnesses, it will be presumed that he was performing his duty of protecting the head end of the cut; and that for this purpose he had stationed himself between the rails just to the north of the engine and out of sight of the engineer, fireman and other crew members.

A mere presumption must fail when there is proof to

the contrary. Tennant could not have been performing his duties while at the same time violating the rules of the Company promulgated for his safety and to prevent this very type of accident. Harkless, who testified for the Plaintiff, said that Tennant had the duty *to keep alert and look out for his own safety.* (Rec. 80.) Tennant, by standing between the rails, as suggested by counsel, had placed himself so that he could not see and observe signals, in violation of Rule 702. (Rec. 117.) If he had chosen this position from which to mount the footboard when the train moved out, then he was violating the general rule which forbade employees from standing on the ground in front of an approaching engine for the purpose of boarding the same. (Rec. 117.) Another slacking operation would have run over a man in this careless position, and the record is uncontradicted that no bell was ever sounded in the yard during coupling and slacking movements. (Rec. 81.) Yet this man, under Petitioner's admission, chose this dangerous and unnecessary place to stand, when with perfect safety he might have remained with the engine, outside the rails, or on the footboard. This Court can only conclude that if it is to adopt Petitioner's theory of what Tennant was doing just prior to his death, it must find that Tennant was *not* carrying out his duty to exercise ordinary care and look out for his own safety.

If it is to be supposed that Tennant chose to stand between the rails during the ten minute waiting period, it can be conjectured with greater weight that the hissing of the air when the air brake was released gave him warning of the intended movement of the engine. It will be remembered that Harkless testified that this sound always preceded the movement of the engine, that it could be heard a car length away. (Rec. 87.) An alert man, hearing this warning, should have been able to get out of the way, but under this supposition Tennant must have elected to remain between the rails for the purpose of stepping

on the footboard as it moved toward him, missing it and being run over. Here it will be patent to the Court that if Tennant knew of the movement of the engine without the ringing of a bell; but thereafter sought to do the forbidden thing of remaining between the rails for the purpose of stepping on the approaching footboard, then it was no negligent failure to give a bell warning which was the proximate cause of death, but his death was solely and proximately caused by his own negligence.

In the opinion of the Circuit Court of Appeals still another conjectural possibility was suggested, that during the period of inactivity, after the cars were coupled together, Tennant might have sat down on the front footboard and dozed off. This is as possible and logical as some of the other conjectures in the case. If this were the fact, then Tennant had placed himself in so perilous a position that he possibly could not have extricated himself whether the bell had rung or not, and he might possibly have been insensible to the bell if it had rung.

There are other theories, based upon circumstantial evidence in the record, having even greater probability. The following is based upon Tennant's previous habits. Tennant might have gone around the north end of the engine and thereafter climbed upon the pilot beam to rest. This was a dangerous and improper thing to do. Harkless testified that there was a place where a man could sit down, but that it was an improper place for a man to sit. (Rec. 86.) Burch, night general yardmaster, said that he had observed Tennant on previous occasions sitting up on the pilot beam of the engine. (Rec. 173.) Burch said that this was a high perch and that a man might slip in getting up there or slip in getting down; also that if a man did get up there and dozed off and the engine started, he could fall off. Tennant might have fallen from this perch either before or after the engine had started. He might have fallen in getting up there or in getting down, and might

have been lying across the rail, unconscious, at the time the engine started. In such event, the failure to have rung a warning bell was no proximate cause of his death. No one knows what happened, but these are possibilities, since he had been known to adopt this negligent practice in the past.

Another deduction based on physical fact is that Tennant might have been investigating the shiny galvanized spring, because it was found in close proximity to his severed hand and lantern. (Rec. 137-138.) The spring was an attractive object and Tennant might have been crouching down, oblivious to the signals, and out of sight of all his crew members, before or after movement of the train, thrusting his arm between the rails in curiosity.

The strongest possibility in the case, based upon physical circumstantial evidence, was that Tennant might have walked around the north end of the engine and back on the east side of the cut. Harkless, Plaintiff's chief witness, said that switchmen sometimes did that and thereafter sought to climb back between the cars. (Rec. 86.) Fireman Cole did not notice Tennant on the east side, but was not looking all the time. The signals were not being given on that side. (Rec. 217.) *The third car from the north end of the cut was the only one upon the wheels of which was any evidence of the accident*, the north wheel of this car having a small bit of flesh upon it. After the accident the first blood on the west rail was found by actual measurement to be 317.6 feet from the switch point of No. "28" switch. (Rec. 113.) Engineer England was of opinion that his engine had shoved in five or six car lengths south of that switch, or a distance of two hundred to two hundred forty feet. (Rec. 197.) Harkless thought the engine had shoved in seven or eight car lengths. (Rec. 89.) Neither England nor Harkless had measured the distance. Nevertheless, this lends weight to the theory that Tennant

was not run over by the engine, but by the third car from the engine. Based on the admission of Plaintiff's witness that switchmen sometimes walked around the cut in this manner, it was possible that Tennant had gone around the east side of the cut for some purpose; that when the movement of the train started he endeavored to climb back between the second and third cars so that he would be on the proper side of the train where signals were being given; that in attempting this dangerous and forbidden practice he fell and was run over by the third car. It will be recalled that Rule 702 forbade a switchman to go between moving cars for any purpose. (Rec. 117.) If this is what he was doing, the failure to ring the locomotive bell was no cause of his death. Under Plaintiff's theory of the case, the bell should have been rung to warn switchmen of the movement of the train, *but if Tennant knew that the train was moving and thereafter sought to do such a dangerous and forbidden act as to climb between the moving cars, then his own carelessness, and not that of the employer, was the effective and direct cause of the injury.*

The foregoing are the conjectural theories which have been presented in this case as possible explanations of the cause of Tennant's death. They are all no more than guesswork. No witness knew the cause of death and it will always be shrouded in the realm of speculation. *However, one thing remains clear, that if Tennant had been performing his duties in accordance with his usual practice, or in the safe manner of performing them that was open to him, the accident would never have occurred.*

The above possibilities of the cause of Tennant's death indicate that he must have been doing some unusual, imprudent and negligent act, in violation of rules promulgated for his own safety, or any standard of ordinary care; and that if by any chance he was carrying out any duty, he had abandoned the safe method which lay open to him and adopted the dangerous and improper method. Under these

foregoing theories of death, some of which are based upon circumstantial evidence, *this Court must recognize that Tennant might have known of the movement of the train, even though not warned by a bell.* In such case the train of causation connecting his accident with a bell warning was broken. It is possible that with full knowledge that the cut was backing out onto the lead, he deliberately sought to do some dangerous act, such as climbing through moving cars, or seeking to step upon a footboard from the center of the rails, in which event his own negligence, rather than the alleged negligence of Defendant, became the sole and direct cause of death. In view of the absence of evidence in this particular case, we respectfully submit that this Court cannot determine the cause of Tennant's death without resort to guessing how it might have occurred. How then could a jury have been expected to determine the issues without similar resort to speculation and conjecture?

This is not a case where there was a conflict of evidence as to how an accident occurred. The Plaintiff has presented no evidence whatsoever. Conjectures cannot take the place of evidence. Petitioner's counsel has said that one tap of the bell might have saved his life, but here again this is guesswork, mere conjecture. Indeed, the uncontradicted facts in this record are that Tennant could not have been expecting a bell. Harkless, Plaintiff's witness, has not only testified that the bell was not rung during coupling up movements, but has further testified that when cars were pulled out of the track onto the lead, his engineer, England, only rang the bell to warn crews of other engines, or pedestrians, or yard clerks,—that the men of his crew knew all about the movement. (Rec. 83-84.) England verified this by stating he never rang the bell while switching in the East Peoria yards unless he as an engineer knew that somebody was in a position of danger. (Rec. 191, 192.) Tennant had been thoroughly in-

structed by the Assistant Superintendent, on at least two occasions, that bells would not be rung in the East Peoria yard for the purpose of warning the crew members, and that Rule 32 qualified Rule 30 in yard switching to prohibit bell ringing except for the purpose of warning persons whom the engineer knew to be in a position of danger. (Rec. 122.) And the various engineers and firemen with whom Tennant had previously worked testified to this same practice and interpretation of the rules. This evidence stands unrebutted in the record, and in the face of it how could it be presumed by Petitioner's counsel, or by a Court, that Tennant could have been relying upon a bell during this routine switching movement, particularly where there is not a scintilla of evidence that the engineer knew him to be in a position of danger at the time? But regardless of this, other possibilities arising from the circumstances indicate that Tennant may have been fully aware of the movement of the cars and that his own negligent conduct and not the failure to ring a bell caused the accident. Petitioner had the burden of establishing that Tennant came to his death as a direct and proximate cause of some negligent act, and, if we are to follow precedent and the rules of fair procedure in the trial of jury cases, conjecture is not enough, and Petitioner has failed to make sufficient proof under this record to present a jury question.

It has always been a rule of decision in Federal and State Courts that where there is an absence of direct evidence upon the cause of death and the circumstances give rise to a number of conflicting theories or possibilities of the cause of the injuries, for some of which the employer is not responsible, a jury will not be permitted to exercise conjecture or speculation in determining which theoretical assumption of facts might have been the effective cause of the death. One of the leading cases of this Court is *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391, where a brakeman was engaged in yard switching

work of breaking up and making up trains and of sorting the cars. It was alleged by the plaintiff that deceased was riding a cut of cars when other cars were negligently caused to be brought into violent contact with those upon which deceased was riding, causing him to be thrown underneath the wheels. One witness testified for the plaintiff on the subject of the alleged collision, but it appeared to the Court that he was standing so far away and his inattention was such that the loud crash he said he heard might not have been the one alleged to have caused the injuries. In the face of overwhelming testimony that there was no collision, as alleged, the Supreme Court looked upon the evidence of this witness as suspicious, and although it was noted that the credibility of witnesses was for determination by a jury, yet it concluded that the story of this witness, under the facts, was "simply incredible." The Court laid down the rule that a verdict based upon mere speculation is not permissible, saying, commencing on page 393:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. *United States F. & G. Co.* v. *Des Moines Nat. Bank*, (C. C. A.) 145 F. 273, 279, 280, and cases cited; *Ewing* v. *Goode*, (C. C.) 78 F. 442, 444; *Louisville & N. R. Co.* v. *East Tennessee, V. & G. Ry. Co.*, (C. C. A.) 60 F. 993, 999; *Tucker Stevedoring Co.* v. *W. H. Gahagan*, (D. C.) 6 F. (2d) 407, 410. * * *
>
> "(4) And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which

testimony it affirmatively appears that the fact sought to be inferred did not exist. * * *

"(5) We think, therefore, that the trial court was right in withdrawing the case from the jury. It repeatedly has been held by this court that before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' *Pleasants* v. *Fant*, 22 Wall. 116, 120, 121, 22 L. Ed. 780. And where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' *Gunning* v. *Cooley*, 281 U. S. 90, 94, 50 S. Ct. 231, 233, 74 L. Ed. 720; *Patton* v. *Texas & Pacific Railway Co.*, 179 U. S. 658, 660, 21 S. Ct. 275, 45 L. Ed. 361. The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' *Bowditch* v. *Boston*, 101 U. S. 16, 18, 25 L. Ed. 980; *Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473, 476, 39 S. Ct. 540, 63 L. Ed. 1092, and cases cited; *Herbert* v. *Butler*, 97 U. S. 319, 320, 24 L. Ed. 958. The 'scintilla' rule has been definitely and repeatedly rejected so far as the federal courts are concerned. *Schuylkill & D. Improvement & R. Company* v. *Munson*, 14 Wall. 442, 448, 20 L. Ed. 867; *Commissioners of Marion County* v. *Clark*, 94 U. S. 278, 284, 24 L. Ed. 59; *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 254, 45 S. Ct. 300, 69 L. Ed. 597; *Gunning* v. *Cooley*, *supra*; *Ewing* v. *Goode*, *supra*, (C. C.) at pages 443-444 of 78 F.

"(6) Leaving out of consideration, then, the inference relied upon, the case for respondent is left with-

out any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This, of course, is inadmissible. *C. M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041; *Gulf, etc. R. R.* v. *Wells*, 275 U. S. 455, 459, 48 S. Ct. 151, 72 L. Ed. 370; *New York C. R. Co.* v. *Ambrose, supra; Stevens* v. *The White City, supra.*"

In *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, the Supreme Court affirmed the direction of a verdict for the defendant. There the plaintiff was a fireman on a passenger engine, and after the run and while the engine was being moved to the railroad yard plaintiff attempted to step from the engine, and in so doing claimed that the step turned so that he fell under the engine and his foot was amputated. It was alleged that there was a failure to have the engine step securely fastened. The evidence of plaintiff was based on mere inference or conjecture that there was something wrong with the step. The defendant introduced testimony showing that the engineer had used the step and found it secure, that competent inspectors had not detected any failure in its fastenings, that the step was in good condition when it left on the trip, and it was impossible to tell without guesswork, from the testimony, how the step had become loosened. Numerous theories were advanced as to how it might have occurred. The court said, on page 277:

"Upon these facts we make these observations: First, That while, in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely (*Stokes* v. *Saltonstall*, 13 Pet. 181, 1 L. Ed. 115; *New Jersey R. & Transp. Co.* v. *Pollard*, 22 Wall. 341, 22 L. Ed. 877; *Gleeson* v. *Virginia Midland R. Co.*, 140 U. S. 435, 443, 35 L. Ed. 458, 463, 11 Sup. Ct. Rep. 859) a different rule obtains as to an employee.

The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & P. R. Co.* v. *Barrett*, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707. Second, That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And, where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third, That while the employer is bound to provide a safe place and safe machinery in which and with which the employee is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employee, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe."

In *Gulf, M. & N. R. Co.* v. *Wells*, 275 U. S. 455, 48 Sup. Ct. 151, it appeared that Wells, a brakeman, ran to get on a moving train which was going about ten miles an hour, and he sought to prove that as he caught the grab iron the engineer gave the train an unusual jerk, which threw him to the ground, causing injuries. All the other members of the train crew were introduced as witnesses by the defendant, and their testimony was to the effect that it was not the duty of the engineer, before starting, to look out for the men who might be on the other side of

the train, and that when the engineer pulled out he did not know where Wells was; that he started in the ordinary way and did nothing which would cause a sudden or unusual lurch of the train; that after a freight train starts there are usually jerks or lurches caused by the running out of the slack between the cars, and that after this slack runs out the engineer could not give any jerk to the train, even by suddenly putting on steam. There was no rebuttal evidence, but it was urged in behalf of the plaintiff that despite this evidence the case should be submitted to the jury, since plaintiff's testimony was some evidence of negligence. The Trial Court did permit the case to go to the jury and there was a verdict for the plaintiff. However, the Supreme Court said, on page 152:

> "It is urged here in behalf of Wells that, despite this evidence, the question of the engineer's negligence was properly submitted to the jury because of an inference to be drawn from Wells' own statement that 'the engine gave an unusual jerk' which was more severe than any he had ever experienced or seen on a local freight train. We cannot sustain this contention. In the first place, there was no evidence that the engineer knew or should have known that Wells was not on the train, but was attempting to get on it after it had started and was in a situation in which a jerk of the train would be dangerous to him. See *Texas & Pacific Railway* v. *Behymer*, 189 U. S. 468, 23 S. Ct. 622, 47 L. Ed. 905. Aside from this, Wells' statement that the jerk was given by the engine, was, obviously, a mere conjecture, as he was then at the side of the caboose, ten car lengths away, where he could not see what occurred on the engine. And his opinion that the jerk was unusual and severe as compared with those which he had previously experienced on local freight trains, had no substantial weight; his situation on the ground by the side of the moving train, after his foot had turned on the piece of coal and he had gone 'down', being plainly one in which he could not compare with any accuracy the jerk which he then

felt with those he had experienced when riding on freight trains.

"In short, we find that on the evidence and all the inferences which the jury might reasonably draw therefrom, taken most strongly against the Railway Company, the contention that the injury was caused by the negligence of the engineer is without any substantial support. In no aspect does the record do more than leave the matter in the realm of speculation and conjecture. That is not enough. *Patton* v. *Texas & Pacific Railway*, 179 U. S. 658, 663, 21 S. Ct. 275, 45 L. Ed. 361; *Chicago, M. & St. P. Railway* v. *Coogan*, *supra*, 478 (46 S. Ct. 564).

"As the jury should have been instructed to find for the defendant, we have no occasion to consider other questions which have been argued in reference to the charge to the jury."

One of the decisions of this Court most closely in point as to the facts is *Atchison, T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351, 50 Sup. Ct. 281. The Circuit Court of Appeals in the instant case has said that despite overwhelming evidence to the contrary there might be "slight" evidence of negligence. In the Toops case the Court found proof of negligence due to the violation of at least two operating rules of the company, but that the question whether these acts of negligence were the proximate cause of the accident depended upon mere speculation. There a freight conductor was found cut to pieces along the tracks following the switching movement. There were no eye-witnesses. The conductor knew the movement that was to take place, just as Tennant knew the next movement in the case at bar. It was charged that the railroad had failed to have a flagman on the leading car of the cut or to place a white light thereon at night, in conformity with its rules. It was also charged as negligence that the road bed was out of repair and had been allowed to become skeletonized. This Court said on page 282:

"(1, 2) But proof of negligence alone does not entitle the plaintiff to recover under the Federal Em-

ployers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. *Patton* v. *Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361; *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 367, 371, 38 S. Ct. 535, 62 L. Ed. 1167; *St. Louis-San Francisco Ry. Co.* v. *Mills*, 271 U. S. 344, 347, 46 S. Ct. 520, 70 L. Ed. 979; *Chicago, M. & St. P. Ry.* v. *Coogan*, 271 U. S. 472, 46 S. Ct. 564, 70 L. Ed. 1041; *New York Central Railroad Co.* v. *Ambrose*, 280 U. S. 486, 50 S. Ct. 198, 74 L. Ed. 562, decided February 24, 1930.

"(3) Even though we assume that in all the respects alleged the petitioner was negligent, the record does not disclose any facts tending to show that the negligence was the cause of the injury and death. The only evidence relied upon by respondent to account for the deceased's presence at the point of the accident was that already stated, which indicated that he had proceeded to the elevator track in order, as he had said, to 'look out' for the kicked cars, whether by climbing onto them and controlling their movement on the elevator track, as is usual in such movements, or by assisting in the spotting movement to be later carried out, can only be inferred. It is the theory of respondent that he attempted to cross the track so as to be in a position to signal the engineer who was on that side of the train. But, as the grain cars already were, or about to be, uncoupled from the train, there was evidently no immediate purpose in his being so located. *What actually took place can only be surmised.* Whether he was run down on the track by the first car, or he attempted unsuccessfully to board the train on one side or the other or succeeded, and in either case, finally came to his death by falling under or between the moving cars is a matter of guesswork.

"(4, 5) Even though we make the doubtful assumption that the train was not within a 'yard,' and so was required to signal its movements, it is plain that de-

ceased and his train crew treated the place as a yard where warning of switching movements was not required. On respondent's own theory, deceased was fully cognizant of the contemplated movement. He knew that the grain cars were to be kicked onto the elevator track where he went to meet them, and knew that his train crew, consisting of only two brakemen, and the lanterns which they carried, would be needed in attending to the switching, signalling and uncoupling of cars in order to kick the train of stock cars onto the passing track, and that the grain cars for which he was to 'look out' would be without brakeman or warning light. It is presumed that deceased proceeded with diligence and due care. *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480, 488, 26 S. Ct. 303, 50 L. Ed. 564. The movement of the fifteen cars to and across the switch and onto the elevator track in a quiet neighborhood on a still night cannot be assumed to have given no warning sounds of their approach.

"All these factors, taken together, render highly improbable the theory of respondent that deceased was run down by the grain cars while he was crossing or standing upon the track, and they give sharp emphasis to the absence of any proof of the fact, indispensable to respondent's case, that deceased, while standing on or attempting to cross the track, was struck by the leading car. There is no evidence to suggest that the body, after falling to the ground, was moved or dragged more than two or three feet. There were no marks of blood or flesh of the decedent upon any part of the leading car, although such marks were found on most, if not all, of the cars following. The kicked grain cars were moving slowly when they passed the switch to the elevator track as they came to a stop two or three car lengths west of the derail. It is true that there was medical testimony that in the case of crushing injuries bleeding might not immediately ensue, but the length of this period of delay was not mentioned, and the testimony given was not stated by any witness to be applicable to injuries of the extent and character suffered by the deceased. It does not account for the absence from the leading car of

the other evidences of the injury found on the other cars. As evidence to support the special finding of the jury that the deceased was struck by the first car, this testimony is without substance. See *Gulf, Mobile & Northern R. R.* v. *Wells*, 275 U. S. 455, 48 S. Ct. 151; 72 L. Ed. 370. If allowed to sustain the verdict, it would remove trial by jury from the realm of probability, based on evidence, to that of surmise and conjecture."

It will be noted that in the Toops case plaintiff sought to establish that decedent was run over by the leading car while standing on or crossing the track, due to a failure to give warning. In the instant case Plaintiff has advanced the hypothesis that Tennant was injured by the engine while standing on the track, due to failure to give warning. In both cases there was no evidence of blood on the leading cars. In both cases there existed the same possibility that the decedent, knowing of the movement of the cars, had sought thereafter to climb upon or through the moving train, in which event the accident might have been caused by decedent's own negligent act, with no causal connection whatsoever with any alleged violation of a rule.

A somewhat similar situation is presented in the case of *Reading Co.* v. *Boyer*, 6 Fed. 2d. 185, where Boyer, the brakeman, who was to make a cut in the switching operation was riding in the engine. It was night. On approaching the switch he was seen to take his lantern and pass toward the steps, between the engine and the car. The engineer heard the safety chains drop, indicating that he was about to alight. This was the last seen or heard of Boyer alive. His mutilated body was found between the main track and siding near the switch. No one knew how the accident occurred, but plaintiff relied upon inferences that it might have happened from various causes. The Court, on page 186, said:

"How he met his death no one knows. Whether in descending the wet steps he fell from the tender, or in

alighting he was thrown under the train because of insecure footing in an unballasted place, or, after safely alighting, he was struck through some fault of the railroad company *or of his own* were questions left to the jury. Until the jury found how he had died, they, of course, could not find the cause of his death, and until they found the cause of his death they could not determine whether it was due to negligence and whether the negligence, if any, was that of the defendant. * * *

"It is not enough for plaintiff to show his injury might have been due to more than one possible cause, for only one of which defendant is responsible. He is obliged to go further and show the cause that fastens liability upon defendant was the proximate one and the jury should not be permitted to base a verdict upon a mere conjecture that the injury was caused by one or the other."

A late case which has recently been reviewed by this Court is *Brennan* v. *Baltimore & O. R. Co.*, 115 Fed. 2d. 555. There the Circuit Court of Appeals for the Second Circuit found that evidence of negligence of the railroad as a cause of derailment of a car was insufficient for the jury in view of the physical circumstances, which refused plaintiffs evidence that he had properly performed his duties. The Court held plaintiff's assumption of the cause of the accident to be mere conjecture and incredible, and relied upon the case of *Pennsylvania R. R. Co.* v. *Chamberlain (Supra)*. The Court held that defendant's motion for a directed verdict should have been granted, further saying that the evidence did not rise above the level of mere speculation, and failed to provide the substantial evidence of negligence required to prove plaintiff's cause of action. Certiorari was denied in *Brennan* v. *Baltimore & O. R. Co.*, 312 U. S. 685, 61 Sup. Ct. 614.

Another late case which depended upon *Pennsylvania R. R. Co.* v. *Chamberlain* and in which certiorari was denied by this Court is *Willis* v. *Pennsylvania R. Co.*, 122 Fed. 2d. 248. In this case a car was shunted in a yard toward

some track laborers without warning. The testimony was that there was a custom among the track laborers that one of their number was to act as a lookout and that Willis had been so delegated. Willis was killed by the car and the case was first permitted to go to the jury, resulting in a large verdict. It was argued by counsel that the jury was free to discredit the testimony that Willis was to act as watchman, even though there was no testimony to the contrary. This would have left the jury free to conjecture as to the cause of the injuries. The Court held that a verdict based on such finding could not stand. A petition for certiorari to this Court was denied on November 10, 1941 in *Willis* v. *Pennsylvania R. Co.*, 314 U. S. 684, 62 Sup. Ct. 187.

In a still later case in which the Circuit Court of Appeals for the Ninth Circuit based its decision upon *Atchison, Topeka & S. F. R. Co.* v. *Toops* (hereinbefore cited as strongly comparable to the case at bar) is *Deere* v. *Southern Pacific Co.*, 123 Fed. 2d. 438. In that case it was charged that decedent was killed while operating a motor car when he was run down by a train, due in part to the failure of the employer to provide sufficient help to remove the vehicle from the track. Decedent was endeavoring to remove the motor car by himself, but the Circuit Court of Appeals noted that he was free to handle his own movements and might have stepped aside to a safe position had he chosen. It was said on pages 441 and 443:

> "With regard to the first charge of negligence, we agree with appellant that when failure to provide sufficient help results in injury to an employee, there exists a ground of negligence which is recognized under the Federal Employers' Liability Act (*Chesapeake & Ohio Ry. Co.* v. *Winder*, 4 Cir., 23 F. 2d. 794), but to permit recovery in such case it must be shown that such failure was the proximate cause of the accident. *Marshall* v. *Chicago, etc., R. Co.*, 131 Minn. 392, 155 N. W. 208; *Strunks* v. *Payne*, 184 N. C. 582, 114 S. E.

840. To recover plaintiff is required to prove not only that the railroad was negligent, but that the injury resulted proximately from that negligence. *Healey v. New York, O. & W. R. Co.*, 2 Cir., 79 F. 2d. 542. Here, the plaintiff contends that the speeder was too heavy for decedent to handle properly. But if it be conceded, arguendo, that defendant did not provide sufficient help, yet there is no showing whatever of a direct causal connection between that omission and the death of plaintiff's decedent. His death was not owing directly to the act of removing the speeder, but was due proximately to his failure to step aside from the path of the train, the approach of which was fully known to him, as is evidenced by the fact that he had begun to remove the speeder from the way of the train. He was free to handle his own movements; there was no superior's order requiring him to stay with the car at the risk of his life. Under these circumstances reasonable men must agree that the accident was not brought about through any failure to furnish sufficient help, and there is therefore no question for the jury on this point. * * *

"In order for recovery to be allowed under the Federal Employers' Liability Act there must be evidence from which a jury could find that there was negligence on the part of the defendant, which negligence was the cause of the employee's injury. *Atchison, T. & S. F. R. Co. v. Toops*, 281 U. S. 351, 50 S. St. 281, 74 L. Ed. 896."

A petition by plaintiff to this Court for writ of certiorari was denied on March 30, 1942 in *Deere v. Southern Pacific Co.*, 315 U. S. 819, 62 Sup. Ct. 916.

Other corollary principles in line with the foregoing decisions are as follows:

The Federal Employers' Liability Act does not make an employer an insurer of the safety of its employees, but to entitle plaintiff to recover the defendant must have been guilty of some act of negligence which was the proximate cause of the injury. *Reese v. Philadelphia & R. R. Co.*, 239

U. S. 463, 36 Sup. Ct. 134; *Wheelock* v. *Freiwald*, 66 Fed. 2d. 694.

A mere scintilla of evidence is not sufficient to sustain a verdict in favor of a plaintiff, but the evidence must be substantial, not vague or uncertain. *Commercial Casualty Ins. Co.* v. *Marjorie Stinson*, 111 Fed. 2d. 63, Petition for Certiorari denied by this Court in *Stinson* v. *Commercial Casualty Ins. Co.*, 311 U. S. 667, 61 Sup. Ct. 25, on October 14, 1940.

Suggestions of counsel, however plausible, cannot take the place of evidence. *United States* v. *Coal Cargo*, 11 Fed. 2d. 805, Certiorari denied, *United States* v. *Cargo*, 273 U. S. 696, 47 Sup. Ct. 92.

Evidence, "however slight," is insufficient to take a case to a jury under the Federal Rule. Where the evidence on one side is overwhelming, so as to leave no doubt as to the facts, the Court should give a peremptory instruction to the jury. *Gunning* v. *Cooley*, 281 U. S. 90; 50 Sup. Ct. 231.

In the instant case the Circuit Court of Appeals first analyzed the record in the light most favorable to the Plaintiff to determine if there was evidence of negligence sufficient to require submission to the jury. The question depended upon whether the rules and practices of the defendant in the East Peoria yards required the ringing of a bell to warn a switchman performing duties similar to those of Tennant. It was held that the evidence was overwhelmingly against this contention. Thereafter the lower Court concluded that "any proof of negligence, *however slight*, is sufficient to present a jury question." We do not believe this to be the rule in the Supreme Court, and say that there is neither *substantial* proof of negligence in this record nor *substantial* proof that the alleged negligence was the proximate cause of the accident.

This Court has not changed its long standing rules for the degree of proof required in jury trials. In *Tiller* v.

Atlantic Coast Line R. Co., 63 Sup. Ct. 444, this Court, on page 451, quoted from older decisions of the Supreme Court and reannounced the rule that *disputed questions of fact* were for the jury, saying, on page 451:

> "Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal *to decide disputed questions of fact*, why it should not decide such questions as these as well as others.' *Jones* v. *East Tennessee, etc., R. Co.*, 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478. Or as we have put it on another occasion, 'Where *the facts are in dispute, and the evidence in relation to them* is that from which fair-minded men may draw different inferences,' the case should go to the jury."

By the aforesaid language this Court has never said that "slight" evidence is sufficient to require submission to a jury. There is no decision of this Honorable Court which has ever indicated that *slight* evidence or a *scintilla* of evidence, or anything less than *substantial* evidence is sufficient. We believe that if this Court will analyze the record as carefully as did the Court below, it will likewise conclude that the evidence was overwhelmingly against Plaintiff's contentions of negligence, and that it will conclude that there exists in this record no substantial evidence of negligence.

In view of this state of the record, it is believed that the Supreme Court should have before it some of the cases upon which we relied below to demonstrate that no negligence on the part of Respondent was shown. For example, this Court has announced the rule that where the injured person is not a member of the class of persons for whose benefit a warning signal should be given, he cannot recover because of a failure to give the signal. *Chesapeake & Ohio Ry. Co.* v. *Nixon*, 271 U. S. 218, 46 Sup. Ct. 495; *Chesapeake & Ohio Ry. Co.* v. *Mihas*, 280 U. S. 102, 50 Sup. Ct. 42; *Central Vermont Ry.* v. *Sullivan*, 86 Fed. 2d. 171; *Nor-*

folk & W. Ry. Co. v. *Gesswine*, 144 Fed. 56. We contended below that it was neither alleged nor proved in this case that Tennant was of the class of persons entitled to a bell warning under the rules, since under the testimony of the interpretation and practices, bells were not rung for the purpose of warning a person not known to be in a position of danger. Where neither the engineer nor fireman knew that employees had located themselves in a position of danger, there is no negligence in failing to give such person a warning signal. *Douglas* v. *Washington Terminal Co.*, 298 Fed. 199; *Mullin* v. *Louisville & N. R. Co.*, 261 Fed. 156. The failure to ring bells in railroad yards is not a dangerous practice *per se*. The ringing of bells and the sounding of whistles on trains going and coming and the switch engines moving forward and backward would merely tend to confusion. *Aerkfetz* v. *Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835. There is no support for the assumption that Plaintiff was without knowledge of the switching practices followed in the yard, since on the evidence it must be held that he knew how switching was done and the members of his crew had a right to believe that he would observe care and keep out of the way of the train movement. *Toledo, St. Louis & W. R. Co.* v. *Allen*, 276 U. S. 165, 48 Sup. Ct. 215.

However, even assuming that negligence did exist, this Court must then determine from the evidence whether such alleged negligence was the proximate cause of Tennant's death. As to this phase of the case, the Court below found that the cause of decedent's death was shrouded wholly within the realm of speculation and conjecture. (Rec. 307.) This result was reached by a Court striving to find something in Plaintiff's favor, but which was compelled to acknowledge that one could only guess or surmise as to the cause of the accident. Under the many decisions of this Court which we have hereinbefore cited, a verdict cannot be permitted to stand which rests upon conjecture.

surmise or speculation; and where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and say that the negligence of the employer was the real cause. In the case at bar, for these reasons, there was no case for a jury.

As was stated by Justice Cardozo in *Shapleigh, et al.* v. *Mier*, 299 U. S. 468, 57 Sup. Ct. 261, at page 264:

> "To the contrary, a Court that is left without knowledge of a fact, after exploring to the full every channel of information, must needs decide against the litigant who counts upon the fact as an essential of his claim."

II.

The Circuit Court of Appeals found that the cause of deceased's death, particularly Plaintiff's theory, was shrouded wholly within the realm of speculation and conjecture. In the preceding part of this argument we have shown that no one saw or knew anything about the occurrence; that the circumstances had only given rise to a series of possibilities or hypotheses as to the cause of death, for virtually all of which Defendant was not responsible; and that this Court has many times held that in this state of the record there is no question for a jury. Petitioner's theory, which is merely one of a number of conjectures in the case, was advanced to the Court below and is somewhat similarly presented to this Court. It is that Tennant was about the north or rear end of the engine, protecting the cut, when he was run over, due to the failure to ring a bell. We have hereinbefore shown that under the uncontroverted testimony he could not have been expecting a bell because, in addition to other evidence, his own crew, with which he had worked for many nights prior,

did not use the bell in yard switching to warn crew members not known to be in a position of danger; and we have shown that no one knew Tennant to be in such a position. Nevertheless, let us analyze Petitioner's theory of the case in the light of the authorities. Let us consider whether, even if Petitioner's theory were to be considered as the sole and only implication in the case to be drawn from the circumstances, it shows any cause of action.

We say that under Petitioner's theory Tennant failed to use ordinary care for his own safety, violated company rules promulgated for his own safety, and that his injuries were directly and proximately caused by his own negligence. If, as Petitioner contends, Tennant remained at or about the north or rear end of the engine, he must have been located between the rails. Had he been standing outside the rails he would not have been run over when the engine moved toward him. Had he been standing outside the rails, Harkless and Bonner, the other members of the crew, would have seen his lantern; but they looked just prior to the reverse movement of the engine and did not see Tennant or his light any place. (Rec. 84, 233.) These men were stationed near the end of the cut, on its west side, when a signal to reverse the engine was given. (Rec. 53, 54, 233.)

From the time Tennant placed his raincoat in the compartment underneath the engine cab, England, the engineer, did not see him. England was keeping a lookout toward the south for signals along the west side of the cut, and when Tennant walked out of his vision, around the north or rear of the engine, that was the last England saw of him that night. (Rec. 196, 197.) England further testified that before he started his engine for the reverse movement, he looked toward the front footboard and also toward the rear footboard. He did not see Tennant on either footboard. (Rec. 200.) Fireman Cole, on the east side of the cab, saw nothing of Tennant as the train started

to move out, although he was then keeping a lookout. (Rec. 218.)

From this undisputed testimony we can only conclude that Tennant had got himself out of sight of both the engineer and fireman as well as the other crew members. He was obviously not standing on the rear or north footboard of the engine where Harkless has said that there were handholds which were all in order and in good condition. (Rec. 86.) Petitioner argued below that he was not on the footboard. The engine moved out without roughness (Rec. 218), and indeed there is no charge of negligence that there was any rough handling. Therefore, under Petitioner's theory, it is to be assumed that Tennant had elected to perform his duty of protecting the cut, according to Petitioner's theory, by standing between the rails, to the north or rear of the engine, and so close to the engine that he could not be seen.

No superior officer told Tennant to protect the cut in this manner. To the contrary, it will be remembered that his foreman, Harkless, testified that if Tennant remained with the engine he must observe care for his own safety. This is, therefore, not a case of an employee being ordered into a dangerous position by his superior; but Tennant, in sole charge of protecting his end of the cut, had the election of standing in a safe position, and in fact had a duty to do so. He chose the perilous and unsafe position between the rails.

Pursuing Petitioner's theory further, we find from the uncontroverted facts that there was available to Tennant a safe way of remaining near the engine. He could have stood on the ground, outside the rails, in perfect security. He could have stood on the footboard, where he could have held onto the handholds, the safety appliances placed there to prevent such an accident. He did not do either of these things.

Rule 702 required switchmen to be in position where they could see signals and know that they were being understood and obeyed before going into a dangerous position. (Rec. 117-118.) Tennant knew from previous experience with this routine operation, which had always been done before in substantially the same manner (Rec. 76), that a signal would be given by the foreman direct to the engineer, which would cause the cut to be backed in his direction. He was an experienced man. (Rec. 76.) He had been twice instructed in the rules of the company. Yet, in violation of said Rule 702, he first went to the dangerous position and chose to place himself where he could not see this signal when the same was given. Under Petitioner's theory, Tennant could hardly have selected a place more unsafe for the performance of this alleged duty. There might have been another slacking operation which would have run him down, and Petitioner's own witness has said that such operations were done without the bell signal. (Rec. 80-81.) He did not tell the engineer or any one else that this was where he was going to stand. He knew the engine would move any minute, yet took no action when one step to the right or left would have saved him. He must have heard the hissing of the air when the engineer released the air brakes, a sound which could be heard a car length away. (Rec. 88.) This must have warned Tennant that the engineer had received a signal and that the engine would move. Still he remained between the rails, in the darkness, out of sight, a few feet from this locomotive. There would have been time for an alert man to step outside the rails to safety. The next thing the engineer had to do was to shift the gear and put the Diesel in reverse. (Rec. 88.) Thereafter the engineer would open the throttle. Harkless has testified that it was necessary for the engineer to do those things to comply with his signal to pull the cars out of Track "B-28" on the night of July 12, 1940. (Rec. 88.) If Tennant was at-

tentive, if he was alert, he was given an opportunity of extricating himself from his voluntary position of peril. Concede that he was depending upon a bell signal, although this is not in conformity with the evidence, he already knew from the hissing of the air brakes that the engine was about to move. There is no evidence in the record as to how long before an engine movement a bell was ever rung. Was it but momentary, or almost simultaneous with the movement? The record is silent. Already knowing that an engine several feet away was about to move in his direction, would a sane man dare fate by waiting still longer for a bell which might not be rung in time to provide means of escape? The only logical assumption of facts to explain his behavior is that he had elected to mount the footboard of the engine from between the rails, which constituted a violation of the general rules of the company prohibiting an employee from standing on the track before an approaching engine for the purpose of boarding the same (Rec. 117); or that the man had become completely inattentive, perhaps sitting on the footboard asleep, as the Circuit Court of Appeals has suggested.

We repeat that Tennant did not observe due care and caution for his own safety; that he violated a rule designed to prevent such an accident; and that he failed to carry out his duty as outlined by Harkless, which was to observe care for his own safety. His own negligence was the direct and proximate cause of his death. From the time he left the sight of England he might have carried out his duties of protecting the cut in a safe manner, but elected to choose a desperately dangerous method.

In the case of *Gilbert* v. *Burlington C. R. & N. Ry. Co.*, 128 Fed. 529, it was said, at page 534:

> "Where there is a comparatively safe and a more dangerous way known to a servant, by means of which he may discharge his duty, it is a want of ordinary care for him to select and use the more dangerous method."

In *Deere* v. *Southern Pacific Co.*, 123 Fed. 2d. 438, previously noted in this brief, where the plaintiff was refused a writ of certiorari by this Court in *Deere* v. *Southern Pacific Co.*, 315 U. S. 819, 62 Sup. Ct. 916, the facts were that decedent was attempting to remove the speeder from the path of an approaching train. He could have stepped aside to safety, but waited too long and was killed. The lower Court said:

> "He was free to handle his own movements; there was no superior's order requiring him to stay with the car at the risk of his life. Under these circumstances, reasonable men must agree that the accident was not brought about through any failure to furnish sufficient help, and there is therefore no question for the jury on this point. * * *
>
> "In order for recovery to be allowed under the Federal Employer's Liability Act there must be evidence from which a jury could find that there was negligence on the part of defendant, which negligence was the cause of the employee's injury. *Atchison, T. & S. F. R. Co.* v. *Toops*, 281 U. S. 351, 50 S. Ct. 281."

This case covers Petitioner's theory of Tennant's death, for under the undisputed evidence, Tennant, if alert, knew of the impending train movement and elected to remain in his position of danger too long. During the entire ten minute wait it was within his option and volition to remain safely alongside the engine, while still protecting the cut, which would have been the safe way to perform his duties. No superior ever told Tennant to protect the cut in the negligent manner in which he is said to have attempted this duty.

In *Willis* v. *Pennsylvania R. Co.*, 122 Fed. 2d. 248, in which plaintiff was denied a writ of certiorari by this Court on November 10, 1941, in *Willis* v. *Pennsylvania R. Co.*, 314 U. S. 684, 62 Sup. Ct. 187, the testimony was that Willis was to look out for cars which were being switched in the direction of his group of track workmen. The fact that

he was run over was an indication that he was not carrying out his duty and that he was not observing due care and caution for his own safety. The lower Court said:

> "The recent Amendment, 45 U. S. C. A. 54, excluding as a defense assumption of risk, has no bearing on the rule that an employee cannot recover for injuries resulting solely from his own fault."

The above case held that where decedent neglected his own personal duty to act as a watchman, this constituted the sole cause of his death. That case depended upon *Davis* v. *Kennedy*, 266 U. S. 147, 45 S. Ct. 33, and *Unadilla Ry. Co.* v. *Caldine*, 278 U. S. 139, 49 S. Ct. 91. In the latter case Justice Holmes, in denying a plaintiff recovery, where the man was in charge of his own actions, laid down a governing rule in cases of this type, as follows:

> "He cannot hold the company liable for disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts."

In the case at bar, if we are to still follow Petitioner's theory, we have a switchman undertaking the duty of protecting the cut, with perfect freedom of action as to how he accomplished the duty, so long as he observed care for his own safety. In so doing, he chose to violate Rule 702, which required him to be in a position to observe signals and to know that they were being obeyed before placing himself in a position of danger, and perhaps was in the course of violating the rule against mounting a footboard from the center of the track, both of which rules were designed and promulgated for the express purpose of preventing just this sort of accident. *As we have said before, this much we know, that if Tennant had carried out his alleged duty of protecting the cut in the safe way that was open to him, by remaining alert, standing near the engine, outside the rails, or standing on the footboard making use of the safe handholds there available, the injury would*

never have occurred. In short, Petitioner's theory or conjecture that Tennant was carrying out his duties in the exercise of due care has no support from the known facts. And if the Court is to take said theory as an admission, then Tennant's conduct and violation of rules preclude recovery under the decisions of this Court. The various cases cited by Petitioner are those in which there is some conflict or dispute in the testimony, which always, of course, makes a jury question.

The Tiller case, upon which Petitioner heavily relies, is totally dissimilar as to facts. There it was *known* that the decedent was carrying on a duty of inspecting seals on cars along a track where the distance from the adjacent track was reduced by the overhang of cars moving in opposite directions three feet seven and one-half inches. The Circuit Court of Appeals in that case found that there was some evidence that the movement of the track where Tiller was killed was an unusual one and probably not expected by him. *There is no element of doubt or conjecture in the Tiller case* as to where the decedent was standing or what he was doing, and there was an issue of fact as to whether the car movement was unusual. In the instant case the car movement which ran over Tennant was routine and was to have been expected by the decedent. Here it is unknown whether Tennant was performing any duty or not, and it is unknown where he had actually stationed or posted himself. A series of conjectures or theories, of which Petitioner's theory is but one, is all that has been presented to the Court. Had he attempted to rest on the pilot beam in accordance with his previous habits, or had he dozed off or fallen in getting up or down from this perch? Had he gone around the north end of the engine to the east side of the cut, as Plaintiff's witness Harkless said he might have done (Rec. 86), and then when the train started to pull out sought to get back on the proper side of the train where signals were being given? Was he, knowing of the

train movement without the necessity of any bell warning, attempting to climb through the moving cars between the second and third car of the cut, in violation of a rule expressly forbidding such an act? Was he attempting to examine or pick up the attractive galvanized spring between the rails, near which his hand was found? Did he, from some unknown position, know that the train was about to move or was moving, and did he thereafter attempt the dangerous act which resulted in his death?

There is a total absence of direct evidence as to the cause of Tennant's death. Only some known circumstances remain from which one can only guess or surmise what occurred. Here is no question of disputed evidence for a jury,—there is no evidence,—only a series of speculative assumptions as to the cause of death, for most of which defendant is not responsible. We do not believe that any "substantial" evidence of negligence was here proved under the Federal Rules, but even though such be assumed, Petitioner then has not met the next burden of a plaintiff to prove by substantial evidence that the alleged negligence was the cause of death. Repeating again the words of this Court in *Patton* v. *Texas & P. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, at page 277:

> "And where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between those half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

And, as was further said in that case, no mere sympathy for the unfortunate victim of an accident justifies any departure from the settled rules of proof resting upon all plaintiffs.

Conclusion.

The United States Circuit Court of Appeals for the Seventh Circuit has given this record exhaustive consideration. Its opinion has only to be read to see that, as Judge Major stated, the evidence and all inferences reasonably to be drawn therefrom were analyzed in the light most favorable to Plaintiff. When it reached the question of proximate cause, the Court was compelled to find that there was no substantial evidence in support of Plaintiff's case, since the actual cause of death was "shrouded wholly within the realm of speculation and conjecture". No other determination was possible under the long settled rules of this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

EUGENE E. HORTON,
Attorney for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 94

MARY TENNANT, ADMINISTRATRIX OF THE ESTATE OF HAROLD C. TENNANT, DECEASED,

Petitioner,

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, A CORPORATION,

Respondent.

ADDITIONAL BRIEF OF RESPONDENT.

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Respondent.

ADDITIONAL BRIEF OF RESPONDENT.

Preliminary.

The Petition for Certiorari having been granted, we understand it to be our privilege to present an additional Brief. At the same time we stand upon those portions of Respondent's Brief, hitherto filed in this proceeding, for the Statement of Facts therein set forth and the more comprehensive citation of decisions. We ask the Court to consider both Briefs filed by respondent.

I.

The Propriety of Directing the Verdict.

The Circuit Court of Appeals for the Seventh Circuit has decided in this case that the Trial Court should have directed a verdict for the defendant (respondent here).

The reason given was that, after a painstaking analysis of the record, *no evidence* could be found upon which a rational inference could be drawn that the alleged act of negligence *was the cause* of the injuries to plaintiff's intestate.

First the Circuit Court of Appeals had found that the evidence was overwhelming against plaintiff's contention that the failure to ring the bell, under the circumstances of this case, was negligent. (Rec. 302-3.) However, it was stated by the Circuit Court of Appeals that it believed that under two recent opinions of the Supreme Court, *Seago, Admx.* v. *New York Central R. R. Co.*, 315 U. S. 781, and *Tiller, Executor, etc.* v. *Atlantic Coast Line R. Co.*, 63 Sup. Ct. 444, there was little room for doubt but that the rule now was that any proof of negligence, however slight, is sufficient to present a jury question; that for this reason said Court was not prepared to hold as a matter of law that there was no negligence. In this respect the Circuit Court of Appeals was considering the *Seago* and *Tiller* cases as a mandate to depart from the time-honored rule in the Federal Courts that the "scintilla rule" is not followed, and that "substantial evidence" is required to make a case for a jury.

Gunning v. *Cooley*, 281 U. S. 90, 50 Sup. Ct. 231;
Peoples Savings Bank v. *Bates*, 120 U. S. 556, 7 Sup. Ct. 679;
Southern Pacific Company v. *Pool*, 160 U. S. 438, 16 Sup. Ct. 338;
Pennsylvania R. Co. v. *Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391.

Having found that there was a slight evidence of negligence, despite overwhelming evidence to the contrary, the Circuit Court of Appeals in this case then stated:

"However, assuming there was negligence in this respect, that alone was not sufficient to take the case

to the jury. * * * The requirement in this respect is stated in *Atchison, T. and S. F. Ry. Co.* v. *Toops, Administratrix*, 281 U. S. 351, 354: 'But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. *The negligence complained of must be the cause of the injury.*' "

The Court thereafter said:

"We have carefully studied the arguments of the parties as presented in their briefs, as well as all the testimony contained in the record, and are forced to the conclusion that no rational inference can be drawn that the failure to ring the bell was the thing which resulted in the unfortunate accident. Before such inference can be indulged, there must be proof supporting a reasonable theory that his death was occasioned by failure of the defendant to warn him of the train movement. Numerous theories are advanced in an effort to explain the deceased's presence beneath the wheels of the train. All of them are highly speculative."

In short, when the Circuit Court of Appeals came to the question of "proximate cause", it ran into the situation that this record is completely barren of evidence, so that not even a scintilla of evidence can be discovered showing that the failure to ring an engine bell was the cause of the injury. Both plaintiff and defendant, in their arguments, have advanced theories which are no more than conjectures or guesses as to what might have been the cause of Tennant's death. Any jury, judge or attorney, who undertakes to say what caused Tennant's death under this record, is guessing.

This Court long ago, in determining the rules for the securing of a fair trial by jury, has said in an unbroken line of decisions, that where the issues can be determined only by resort to conjecture, speculation or guesswork, then the Trial Court shall take the case from the jury as a

matter of law. *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391; *Patton* v. *Texas & P. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275; *Gulf, M. & N. R. Co.* v. *Wells*, 275 U. S. 455, 48 Sup. Ct. 151; *Atchison, T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351, 50 Sup. Ct., 281; *Brennan* v. *Baltimore & O. R. Co.*, 115 Fed. 2d 555 (Certiorari denied, *Brennan* v. *B. & O. R. Co.*, 312 U. S. 685, 61 Sup. Ct. 614); *Willis* v. *Pennsylvania R. Co.*, 122 Fed. 2d 248 (Certiorari denied, *Willis* v. *Pennsylvania R. Co.*, 314 U. S. 684, 62 Sup. Ct. 187). The decisions following this rule are legion.

What was it necessary for plaintiff to prove in this case? The issues in this case are now confined to one narrow specification of negligence, charged in the Amended Complaint, that defendant had promulgated for use in its East Peoria yard its Rule 30, that the engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grades, and to prevent accidents; that while Harold C. Tennant was working as a member of a switching crew in said East Peoria yard, the defendant violated this rule, *which said violation was the cause of Tennant's injury.* There are no broad issues of general negligence in this case, nor is the question whether defendant furnished a safe place to work before this Court; nor were such charges of negligence alleged. We are limited here to inquiring whether, (First) there was any substantial evidence that this rule was promulgated for the benefit of Tennant in the East Peoria yard, and whether the same was violated; and, (Second) whether the failure to ring a bell has been proved to be the cause of Tennant's injuries.

We do not believe that the well considered decision of the Circuit Court of Appeals, in resolving this question in behalf of the defendant, should be set aside because of economic reasons. We do not believe that every case instituted under the Federal Employers' Liability Act must be

determined by a jury, whether evidence has been presented or not. It is not one of the elements of a trial by jury, as guaranteed by the Seventh Amendment to the Constitution, that the trial should be solely by juries, but rather by court and jury, as noted by Mr. Justice Roberts in his dissenting opinion, joined in by Mr. Justice Frankfurter and Mr. Chief Justice Stone, in *Bailey* v. *Central Vermont Ry.*, 63 Sup. Ct. 1062.

The view stated by Mr. Justice Roberts finds ample precedent. Blackstone, in describing trial by jury as the glory of the English law, explains that the trials were conducted by judge and jury together, with the Court having the right to withdraw issues from the cognizance of the jury as matters of law upon demurrer to the evidence. Commentaries on The Laws of England, Blackstone, 2d Edition, Book III, Page 371. Justice Story, in 1813, stated in the case of *Young, et al.* v. *Black*, 7 Cranch 565, that a demurrer to evidence is allowed or denied by the Court in the exercise of a sound discretion under all the circumstances of the case. In 1850, in the case of *Parks* v. *Ross*, 11 Howard 362, when defendant's counsel had requested an instructed verdict, this Court said:

> "It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the Court to decide all questions of law arising thereon. But a jury has no right to assume the truth of any material fact without some evidence legally sufficient to establish it. * * * Hence the practice of granting an instruction like the present, which makes it imperative upon the jury to find a verdict for the defendant, and which has in many States superseded the ancient practice of a demurrer to evidence. It answers the same purpose and should be tested by the same rules."

In *Pleasants* v. *Fant*, 22 Wall. 116, decided in 1874, this Court, commenting upon the right to direct a verdict, discussed *Parks* v. *Ross* (*supra*); *Schuchardt* v. *Allens*, 1

Wall. 359; and *Improvement Company* v. *Munson*, 14 Wall. 448; and said that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party upon whom the onus of proof is imposed. The Court went on to say:

> "It is the duty of a Court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of the trial. * * * In the discharge of this duty it is the province of the Court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. * * * Must the Court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff, that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the Court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the Court should say so to the jury."

The principle that the Courts have the right to direct a verdict, or to set aside a verdict, has been consistently maintained by State and Federal Courts since the time of the foregoing decisions, and may be considered an integral part of our system of American jurisprudence. It is apparent that it is not the right of every plaintiff, regardless of sufficiency of the evidence produced, to have his cause submitted to a jury, nor is this the true concept of the right of trial by jury, either under the British common law or the decisions of our American courts. And indeed, under the Federal Rules of Civil Procedure, as promul-

gated by our Supreme Court, the right to move for a directed verdict, or for a judgment notwithstanding the verdict, has been preserved and still stands unabridged. Rule 50, Title 28, Sec. 723-c, United States Code Annotated.

II.

Insufficiency of the Evidence to Warrant Submission to the Jury.

A.

The Question of Defendant's Negligence.

The Circuit Court of Appeals has said that the evidence is overwhelming that there was no practice in defendant's East Peoria yards to ring engine bells for the purpose of warning switchmen not known to be in a position of danger. Under the limited charge of negligence in this case, it was incumbent upon plaintiff to prove that Rule 30, requiring a bell when an engine was about to move, was promulgated in the East Peoria yards for the benefit of an employee working in the capacity of Tennant at the time of his fatal injuries. It is an established proposition of law that the mere proof of a rule is insufficient. It must likewise be proved that said rule was in force for the protection and benefit of the particular employee. *Chesapeake & Ohio Ry. Co. v. Mihas*, 280 U. S. 102, 50 Sup. Ct. 42; *Chesapeake & Ohio Ry. Co. v. Nixon*, 271 U. S. 218, 46 Sup. Ct. 495; *Thompson v. Downie*, 78 Fed. 2d 487; *McClellan v. Pennsylvania R. Co.*, 62 Fed. 2d 61; *Central Vermont Railway v. Sullivan*, 86 Fed. 2d. 171; *Norfolk & W. Ry. Co. v. Gessaine*, 144 Fed. 56.

In *Chesapeake & Ohio Ry. Co. v. Mihas* (*Supra*), where a failure to give a warning signal was urged as the act of negligence, this Court said:

"If there was a violation of duty, therefore, on the

part of the railway company, it was not of a duty owing to Mihas; and the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation, unless that duty or obligation was one owing to the complainant."

Likewise it is the rule of this Court that the failure to ring bells in railroad yards is not a dangerous practice *per se*. *Aerkfetz* v. *Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835; *Toledo, St. Louis & W. R. Co.* v. *Allen*, 276 U. S. 165, 48 Sup. Ct. 215.

The evidence produced by plaintiff to establish that Rule 30 was promulgated in the East Peoria yards of defendant for the benefit of plaintiff's intestate was as follows:

One witness was called: Sheldon Harkless, foreman of Tennant's crew, no longer in service, who admitted he was "sore" at the company. (Rec. 73-74.)

He said that Rule 30 was in the book of rules of the defendant. (Rec. 59.)

He said that the rule was in effect on July 12, 1940, but failed to say that it was in effect in the East Peoria yards of defendant. (Rec. 61.)

He admitted that it was not the practice in the East Peoria yards to ring engine bells when couplings were being made, or when the engine was pulling back to slack the cars. (Rec. 80-81.)

He admitted that the custom and practice of his own crew, in pulling cuts out of track B-28 on nights prior to July 12, 1940, was that the engine bell was not rung, except "to warn other crews of engines—of other engines—and pedestrians around, yard clerks". The members of his own crew, he stated, "knew all about the movement." (Rec. 83-84.)

He admitted on cross-examination that Tennant's duties

required him to see that the switches were lined up so the train movement could go out on track 28 and get onto the lead, and that the other duty was to keep alert and look out for his own safety. (Rec. 80.)

Thereafter the defendant placed on the stand its Assistant Superintendent, who testified that Tennant was an experienced switchman, and that he had been twice instructed that Rule 30 was to be considered in conjunction with Rule 32, prohibiting the unnecessary use of either the whistle or bell, also that bells would not be rung in the East Peoria yards for the purpose of warning crew members, unless the engineer knew such crew member to be in a position of danger and oblivious to the train movement. (Rec. 117-122.)

Not only the Assistant Superintendent, but the night general yardmaster, the assistant yardmaster, four engineers and two foremen, all of long experience, together with the remainder of the members of Tennant's own crew, all testified to the effect that the rules, as promulgated for use in the East Peoria yards, did not require the ringing of a bell when an engine was about to move, unless the engineer of the crew knew that some crew member was in danger; that the custom and practice of switching in said yards was that bells were only rung to warn pedestrians, yard clerks and others (not members of the crew since they were familiar with the movement), but never to warn members of the crew unless he was known by the engineer to be in danger. (Rec. 140-237.)

There was no evidence whatever that the engineer knew Tennant to be in danger at the time of the fatal movement of the engine. On the contrary, engineer England testified that on all previous nights, when Tennant worked with his crew, the latter would make the first coupling on track B-28, after which he would walk around the north end of the engine, and later when the cut pulled out onto the

lead, Tennant would always be found standing by the B-41 switch; that this was the routine thing on all previous nights that Tennant worked as a member of his crew. (Rec. 198-9.) On the night in question, after Tennant had walked around the north end of the engine, England did not consider him a "missing man". He thought that Tennant had gone out to the 41 switch. (Rec. 213.)

About 75% of Ternant's work was in the East Peoria yards, and he had worked with this particular crew on various occasions during the preceding four months. (Rec. 123-124.) He had worked at different times with all the engineers and foremen, who testified for defendant in this case, and they have stated that during such times it was not the custom and practice to ring bells in the East Peoria yards to warn crew members, unless they were known by the engineer to be in danger.

A study of the record should convince this Court that there was no custom and practice of ringing bells in the East Peoria yards of defendant every time an engine was about to move; that Rule 30 was qualified by Rule 32, prohibiting the unnecessary ringing of bells; and as promulgated in the East Peoria yards said two rules, taken together, did not require the ringing of a bell to warn a crew member, unless known to be missing or in danger. Plaintiff has merely shown the existence of Rule 30 standing alone in the Rule Book, but has failed by any evidence to prove that it was promulgated in the East Peoria yards to warn a man performing the duties of Tennant at the time of his injury. There is not a scintilla of evidence that Tennant was relying on the bell at the time of the train movement. On the other hand, the only testimony in the record is that Tennant had been twice instructed that under the rules, as applied to the East Peoria yards, he would not be warned; that he had worked with various engineers and foremen on previous occasions in said yards,

under whom the practice and custom of switching was not to warn men performing the duties of Tennant; that Rules 30 and 32, as promulgated, did not require such a warning bell for the benefit of Tennant, and that he had been instructed in said application of rules.

The Circuit Court of Appeals for the Seventh Circuit found the evidence overwhelming against the contention that the defendant had negligently violated any obligation owing to crew member Tennant at the time and place in question.

B.

The Alleged Act of Negligence Not Proved to Be the Proximate Cause of the Injury.

The Circuit Court of Appeals has said that after a careful study of all the testimony in the record it was forced to the conclusion that no rational inference can be drawn that the failure to ring a bell was the thing which resulted in the unfortunate accident; that there was no proof supporting a reasonable theory that death was occasioned by failure of the defendant to warn Tennant of the train movement; that numerous theories had been advanced, but that all of them were highly speculative. The cause of decedent's death, stated the Court, "is shrouded wholly within the realm of speculation and conjecture." The Court quoted from several decisions hereinbefore cited in this Brief, among which was the decision in *Gulf, M. & N. R. Co.* v. *Wells*, 275 U. S. 455, 48 Sup. Ct. 151, in which, on page 459, it was said:

> "In short, we find that on the evidence and all the inferences which the jury might reasonably draw therefrom, taken most strongly against the Railway Company, the contention that the injury was caused by the negligence of the engineer is without any substantial

support. In no aspect does the record do more than leave the matter in the realm of speculation and conjecture. That is not enough."

What is the state of the record? Plaintiff put on one sole witness, Harkless, who said that at the time of the accident he was twenty car-lengths, or 800 feet away. (Rec. 79.) He did not know of his own knowledge how Tennant was injured. (Rec. 87.)

Harkless said that after the cars had all been coupled together on track B-28 he gave a back-up signal to the engineer; that on straight tracks, such as B-28 in the East Peoria yards, the foreman usually signaled direct to the engineer, so that there was no necessity of relaying the signal through Tennant. (Rec. 85.) That at the time he gave the signal he did not see Tennant any place (Rec. 80); that if Tennant had been standing at the side of the engine, Harkless could have seen his light; that the hand-holds on the footboard of the Diesel engine were in good condition. (Rec. 86.) Tennant's duties, he said, were to be there with the engine to line switches out when they pulled out of the track; that he had two duties to perform, one of which was to see that the switches were lined, and the other was to keep alert and look out for his own safety. (Rec. 80.)

Later Harkless testified that following the accident they discovered the body outside the west rail at B-28 switch; that the head and right hand were missing; that about seven or eight car lengths south of the switch the right hand and lantern were found, together with Tennant's cap. There was a pool of blood outside the west rail. (Rec. 56-8.)

The plaintiff rested on this evidence as to the cause of the accident. No additional testimony was offered. The Court will note that there was no evidence offered by plaintiff as to where Tennant had located himself or what he was

doing just prior to the train movement. It is obvious that he was not down at the switches to see that they were lined, and that he had not proceeded up to B-41 switch, as had been his previous custom. He was not standing beside the engine, outside the rails in a position of safety, because his lantern was not seen by Harkless. There was no evidence upon which a presumption could be based that he was performing his duty of keeping alert and looking out for his own safety. In short, plaintiff's case is barren of any evidence, except to the effect that Tennant was run over by this train and that plaintiff's witness did not know how it happened.

Defendant put on the other members of Tennant's crew. None of them saw the accident and none of them knew how it happened. Cole, the fireman, did not know how Tennant was killed. He had heard no shouts or outcries of any kind. (Rec. 218.) Bonner, fieldman of the crew, was at the other end of the cut, near Harkless. At the time of the train movement he did not see anything of Tennant, nor did he see his light. (Rec. 232.) He said that Tennant's duties were to attend to the switches and protect the engine,—also to take care of himself. (Rec. 231-2.) Bonner said that he was performing his own duties and that he assumed Tennant was performing his. (Rec. 233.) Bonner did not know how Tennant was killed. (Rec. 234.)

Engineer England testified as to coupling all the cars together on track B-28. Tennant had made the first coupling. After the cars were all together he saw Tennant standing alongside of the cab, putting his raincoat in a box underneath the cab window. He put his raincoat in the compartment and got his cap and jacket, put them on, and walked around the north end of the engine, and that was the last England saw of him that night. (Rec. 194-6.) England said Tennant's duties were to go out on the lead

and find whether the switch was lined for them, but that when Tennant went around the engine he walked out of England's vision. England continued to look south along the west side of the train for signals. (Rec. 197.) England stated that on all previous nights, after they had coupled up the first car, Tennant would walk around the north end of the engine in just the same way, and that when the engine would pull up on the lead track over 41 switch, Tennant was always found at that point. (Rec. 199.) When Tennant had walked around the engine on the night in question, England did not consider him "a missing man", but thought he had walked down to the 41 switch.

England testified that after Tennant walked around the north end of the engine there was a ten minute wait, during which time he continued to look south along the west side of the train for signals. He finally got the signal and reversed the train in a northerly direction out onto the lead and over the 41 switch, at which place he expected to get a signal from Tennant, but did not get it. The movement that night was performed substantially in the same manner that it had been performed on previous nights. (Rec. 197-8.)

England further testified that before he started his engine he looked and did not see any one on either the front or rear footboard of his engine, but that Tennant did not ride on the footboards, but generally walked away down to the switches.

Plaintiff had introduced no evidence as to the habits of Tennant as being a careful man. On the other hand, defendant introduced the testimony of Burch, Assistant Yardmaster, who testified that on previous occasions he had noticed Tennant had a habit of sitting up on the pilot of the engine; that he would climb up on the front end of the engine onto the pilot beam, which was a high perch, and where a man might slip in getting up or in getting

down. This was an unusual and improper place for a man to sit. (Rec. 173-5.)

Harkless had testified that switchmen sometimes walked around a train for some purpose and then climbed back through the cars to get on the side where signals were being given. (Rec. 86.) He also admitted that it was not proper for a man to sit on the top of the drawhead of the Diesel. (Rec. 86.)

Assistant Superintendent Keeler had examined the scene after the accident and found Tennant's right gloved hand between the rails of track B-28, with the lantern still burning and the handle of the lantern about one inch from the fingers. (Rec. 137-8.) He had examined the footboards and the hand-holds and found them all to be in good condition. He inspected the wheels of the cars and on the *outside rim of the north wheel of the third car from the engine he found a bit of flesh.* He found no evidence of blood on any of the wheels of the Diesel or on the first or second car. (Rec. 138.)

This constituted all the evidence in the record as to the cause of Tennant's death. There had been no eyewitness. Tennant was an experienced switchman, knew all about the proposed movement of the train, and in particular knew that it would move when a signal was given by the foreman at the other end. According to his instructions and experience in these yards, he knew that no bell would be rung to warn him. There is no evidence that he had notified the engineer or any other member of the crew that he expected to go into a position of danger. Every one thought that he was attending to his duties and looking out for his own safety. Nor did the engineer have any thought that he was in danger or missing. Plaintiff's witness Harkless has testified that the bell was not rung by his crew either in coupling up cars or slacking or pulling

the cars out onto the lead, except when it became necessary to warn other engine crews, pedestrians or yard clerks. His own crew members knew all about the movement. (Rec. 83-4.)

Where Tennant was and what he was doing when the engine moved remains a mystery. Plaintiff has sought to raise the presumption that he was doing his duty; but the Circuit Court of Appeals held that all presumptions fail in the face of evidence to the contrary; that there is no dispute in the evidence but that the deceased was not in the performance of duty at the time of his death, nor relying upon a bell. (Rec. 306.)

The performance of his duty would have required that Tennant proceed ahead of the engine down to B-41 switch, to see that all switches were lined, in which event he would have been safe, or if he elected to remain with the engine he could have stood alongside it, outside the rails, where he could have been seen and also where he could see the signals which were being given, in conformity with the requirements of Rule 702 (Rec. 117); or he could have stood upon the footboard, where there were safe hand-holds. (Rec. 86.) Under this record he did none of these things. *Instead, plaintiff's counsel insist that he was standing between the rails, out of sight of the other crew members, only a few feet north of the engine.* This is only a conjecture by plaintiff's counsel, but it constitutes an admission that Tennant had elected not to remain in a safe place, but to stand in a spot of peril, without any orders or instructions so to endanger himself. Rule 702 requires a switchman to be in position to see signals, and if this is what Tennant was doing, then he was not only violating a rule of the company established for his own safety, but was not performing the duty, as defined by Harkless, of looking out for his own safety. Moreover, if he had so es-

tablished himself, for the purpose of boarding the engine when it moved toward him from a point between the rails, he was violating the general rules of the company, prohibiting a man from standing in front of an approaching engine for the purpose of boarding the same. (Rec. 117.) Rather than performing his duties, it is an unescapable conclusion, from the facts and circumstances, that he was violating them.

Since it is impossible to ascertain from the proof in the case what Tennant was doing, or where he had stationed himself, a number of conflicting theories have been advanced:

(1) Based on his previous habits, Tennant might have been improperly sitting upon the pilot beam of the Diesel. When the engine started he might have been attempting to climb down, slipping and falling under the wheels.

(2) He might have sat down on the front footboard and dozed off (as suggested by Judge Major). If this is true, he had voluntarily placed himself in a position where he possibly could not extricate himself, whether a bell were sounded or not.

(3) He might have been standing in front of the north end of the engine, between the rails (as suggested by plaintiff's counsel), in violation of rules and in violation of his duties, attempting to board the engine as it moved toward him.

(4) He might have walked around the north end of the engine and onto the east side of the cut (which Harkless said switchmen sometimes did), then, noting the movement of the train, without the necessity of any bell warning, he possibly undertook the dangerous and forbidden thing of climbing back through the moving cars, in violation of Rule 702, so that he would be on the correct side from which the signals were being given. He possibly sought to climb back

between the second and third cars from the engine, because the north wheel of the third car bore evidence of flesh, and neither the wheels of the Diesel nor of the first or second cars bore any signs whatever.

Perhaps other theories might be evolved as to the cause of Tennant's death. However, the foregoing are all possibilities, and every one of them points to some negligent, voluntary, improper act of Tennant as a direct and proximate cause of his injury. Under these theories it is as possible as not that he knew the train was moving, without the necessity of a bell warning, and thereafter sought to do some dangerous and forbidden thing, such as climbing through the moving cars, or seeking to get on the front footboard from between the rails. It is because of this state of the record in this particular case that the salutary rule of the Supreme Court, announced in an unbroken line of decisions, applies here. As said in the leading case of *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover."

And in *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, this Court said:

> "And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

Judge Kerner of the Circuit Court of Appeals dissented, saying that "it was a permissible inference by the jury that the failure to sound the bell was the proximate cause of Tennant's death" and that this was a jury question. He gave no facts or reasons for this conclusion.

It is easy to say that a question was for the jury, but, under the tested rules of evidence in trial procedure, we do not believe this record, when carefully studied, permits any other conclusion than that reached by Judges Major and Sparks. There simply was no proof, nor any reasonable inference, that the failure to ring a bell was the proximate cause of Tennant's death. There is no dispute or conflict in the evidence. It is undisputed that under Tennant's instructions and his experience in these yards he was bound to have known that no bell would be rung for his benefit. There was no dispute (in fact, it was testified to by plaintiff's witness Harkless) that Tennant's own crew customarily did not use the bell when coupling up cars or pulling them out onto the lead, such as the movement in question, for the purpose of warning crew members, they knowing all about the movements. There was no dispute but that he was experienced and knew all about the train movement and that this engine and cars would shortly move in a northerly direction on track B 28, upon a signal given direct from the foreman at the other end of the cut. There is no dispute but that he had voluntarily placed himself where none of the crew members could see him and where he could not see their signals, although the performance of duty would have required him to remain outside the rails where he could see said signals if he was to stay with the engine. There is no dispute in the evidence but that all his fellow crew members assumed he was performing his duties of lining switches and looking out for his own safety. There is no evidence that any one knew him to be in danger. When such a record is analyzed, this Court will see that Judge Kerner was indulging in an unsupported conclusion.

We ask that this case be decided upon its own record. It does not compare with any other cases cited by plaintiff's counsel. In all the recent decisions of this Court there has been some conflict of evidence in the particular negligence alleged. In these cases it has been known what the employee was doing at the time of the accident and the cause thereof. But in this case we say that the Court will have to guess whether Tennant was killed as a result of some voluntary negligent and dangerous act of his own, or from some other unproved thing; and in this state of the record no jury should be permitted to indulge in such guesswork or speculation.

In Conclusion.

If this Court has determined to reverse the decision below, then such reversal should be limited to the question of submission to a jury, which was the only point argued here. There were numerous other questions preserved in the appeal from the District Court to the Circuit Court of Appeals, involving the prejudicial method employed by the Trial Court in charging the jury, the giving of improper instructions, the failure to give interrogatories, as provided by the rules of this Court, the excessive amount of the verdict when tested by the decisions of this Court, the motion for a new trial. (Rec. 270-272.) These questions were not decided by the Circuit Court of Appeals for the reason that it concluded that a verdict should have been directed for the defendant. If this case should be remanded, respondent should have the right to a determination of these other points, which have not been argued in this Court.

However, we respectfully urge that under this particular record the decision of the Circuit Court of Appeals should be affirmed; that as a matter of law there is no case for a

jury; that the Circuit Court of Appeals has not decided a federal question, in conflict with the applicable decisions of this Court, but in conformity with the decisions thereof; and that the Court below has not departed from the accepted course of judicial proceedings.

PEORIA AND PEKIN UNION RAILWAY COMPANY, A CORPORATION,
Respondent.

BY EUGENE E. HORTON,
Its Attorney.

Office - Supreme Court, U. S.
FILED
FEB 5 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 94

MARY TENNANT, ADMINISTRATRIX OF THE ESTATE OF HAROLD C. TENNANT, DECEASED,

Petitioner,

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION FOR REHEARING.

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Now comes Peoria and Pekin Union Railway Company, a corporation, Respondent, and respectfully petitions the Court for a rehearing, pursuant to the rules of said Court. Respondent presents in support thereof certain alleged misapprehensions of law and fact in the opinion of the Court, as follows:

I.

The Court has based its opinion in this case upon the rule of *Looney* v. *Metropolitan R. Co.*, 200 U. S. 480, that it will be presumed that the deceased was actually engaged in the performance of his duties and was in the exercise of due care for his own safety at the time of his death.

The Court has said, with reference to Tennant, that "It was his duty as a switchman or pin-puller *to stand ahead of the engine* as it moved back out of track B-28, protect it from other train movements, and attend to the switches". The evidence, the Court says, indicates that Tennant must have been killed approximately at the point where the engine began its backward movement "and where he might have been located in the performance of his duties". Since Tennant was run over, the Court must presume also that he had located himself ahead of the engine, either between or upon the rails. There is no evidence in this record that any duty required Tennant, at the time and place of the accident, to be between or upon the rails, so close to the engine that neither the engineer nor fireman could see him when they commenced a lookout in that direction at the time of the movement of the cut. (Rec. 200, 218.)

PLAINTIFF'S TESTIMONY—HARKLESS:

Q. Tennant's job was what in connection with the movement of the train, and his position and location? What did you call him?

A. Well, they called him "pin puller" or "head man" or "head brakeman" or "head switchman".

Q. The work "head brakeman" or "head switchman" or "head man", that doesn't mean the same as we mean with reference to head waiter, that he is over somebody. It simply means he follows the head end?

A. Yes, sir.

Q. And the head end is your engine end?

A. Yes, sir.

Q. In this particular instance, he was the man that would stay closest to the engine?

A. Yes, sir. (Rec. 53.)

CROSS-EXAMINATION OF HARKLESS:

Q. What were his duties?

A. Well, his duties was to be there with the engine to line the switches out when we pulled out of the track.

Q. He had two duties to perform, didn't he, at that time? One being to see that the switches were lined up so the train movement could go out on track 28 and get onto the lead? Wasn't that one of them?

A. That was one of them.

Q. The other duty he had was to keep alert and look out for his own safety? Wasn't that the other duty?

A. Yes, sir.

Q. And when you gave your signal, you assumed that he was following his duties, didn't you?

A. Yes, sir. (Rec. 89.)

DEFENDANT'S TESTIMONY—ENGLAND:

Q. What duties did Tennant have to perform at that time?

A. He had none to perform after he made that first coupling.

Q. He had none to perform with reference to coupling up the track?

A. No, sir.

Q. But after he walked around the engine what duties did he have to perform?

A. He had to go out on the lead and find out whether the switch was lined for us or no, but I never looked back to see which way he went after he left the engine. (Rec. 197.)

DEFENDANT'S TESTIMONY—BONNER:

Q. What were Tennant's duties after he made that first coupling?

A. Stay near the head end.

Q. And do what?

A. Attend to the switches and protect the cut, engine.

Q. Did he have any duties to perform with reference to his own safety?

A. Certainly.

Q. What were they?

A. To take care of himself.

Q. Was there any necessity for him to relay any signals which might be given?

A. Not in this instance.

* * * * *

Q. That train had to go out of that track first through the B-28 divide switch, didn't it?

A. Yes.

Q. And then it had to go through another switch called "B-28 switch"?

A. Yes.

Q. That got it onto the middle lead, did it not?

A. Yes, sir.

Q. Then the engine had—train had to go clear down past the B-41 switch, did it not,—

A. Yes, sir.

Q. —in connection with this movement? And it had to keep on going through the puzzle switch?

A. Diamond.

Q. The diamond switch which is to the north of B-41 switch, and keep going far enough to the north so that the rear end of the cut would clear 41 switch?

A. Get over the switch.

Q. And somebody had to see all those switches were lined?

A. Yes, sir.

Q. *Was that the duty of the pin puller?*

A. *Yes, sir.*

Q. When he went out of sight, that was where he would ordinarily go, was it?

A. Well, that I couldn't say. I don't know where he would ordinarily go because I would be taking care of my business and tying into this cut.

Q. You were usually working down along the length of cars, and not paying any attention to where Tennant went? You were performing your duties, is that right?

A. Yes, sir.

Q. And assumed he was performing his?

A. Yes, sir. (Rec. 232-233.)

The foregoing evidence in this record as to Tennant's duties just before the accident would have required him, while protecting the head end of the cut from other engines, to walk north of the engine along track B-28 to line the various switches discussed by Bonner. Had he done this, it is obvious that he would not have been run over at the place where the blood stains were found. He had from five to ten minutes within which to walk away from this place to perform these duties, but obviously chose to loiter near the cars, where, as the above testimony shows, he had no further duties to perform. Why does the Court disregard this evidence,—the only evidence in the case on the subject, and presume that he was engaged in the performance of his duties, in the exercise of due care, *ahead of the engine*, at the location where the pool of blood was found, approximately at the point where the engine began its backward movement? Necessarily he must have been between or upon the rails, and no one has said that he should perform his duties in this manner, but, on the other hand, that he should observe all care and

caution. We submit that the opinion of the Court, in presuming Tennant to be performing his duties in a prudent manner in the location fixed by the Court, is overcome by the facts of what his duties were and what he was supposed to be doing at the time.

Moreover, the Court has given no attention to the other rules in this record. Rule 702 (Rec. 117) required that a switchman not only was forbidden to go between cars in motion, but must be in position to see signals, and must know that such signals are being understood and obeyed before placing himself in a dangerous position. Yet both Harkless and Bonner have testified that Tennant was out of sight at the time the signals were given for the back-up movement, and hence, under this record, he had first placed himself in a dangerous position without waiting to observe the signal.

The General Rules (Rec. 117) prescribed that employees must exercise care to avoid injury, that they must expect trains to run at any time in either direction, that they must not stand on the track in front of an approaching engine or car for the purpose of boarding the same.

The observance of these rules were part of Tennant's duties. They are facts in evidence, and when considered, together with the other facts as to Tennant's duties, should be convincing that Tennant was not properly performing his duties, as the Court presumes.

Presumptions are indulged in to supply the face of facts, but are never allowed against ascertained and established facts, and when these appear, presumptions disappear. *Lincoln* v. *French*, 105 U. S. 615. In Vol. 31, Corpus Juris Secundum, at page 731, the general rule is set forth that a presumption of law is an inference, which, in the absence of direct evidence on the subject, the law requires to be drawn; that such a presumption will sustain the burden of

evidence until conflicting facts on the point are shown. Where such evidence is introduced, the presumption is *functus officio*, and drops out of sight. If this Court will reconsider the question of whether a presumption exists that the deceased was engaged in the performance of his duties at the place where the pool of blood was found, in the exercise of due care for his own safety, in the light of the foregoing facts to the contrary, it is not believed the Court will permit such presumption to prevail.

II.

The Court has said in the opinion that: "In addition, the evidence relating to the rule and custom of ringing a bell 'when an engine is about to move' warranted a finding that Tennant was entitled to rely on such a warning under these circumstances. The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life." We are certain that the Court has misapprehended the evidence in this record and has chosen to follow plaintiff's unsupported theory in this regard.

Admitting that Rule 30 was in the Rule Book of the company, yet the undisputed evidence in the record is that Tennant was twice told by Keeler, the Assistant Superintendent, that, in switching in the East Peoria yards, engine bells would not be rung under said rule to warn a member of the crew performing Tennant's duties, unless the engineer knew him to be in a position of danger. (Rec. 120-122.) There is no evidence that Tennant had any other idea or understanding about this rule. Harkless himself testified that it was not the practice of Tennant's own crew to ring the engine bells during coupling operations. (Rec.

81.) When cars were pulling out of a track onto the lead, Harkless said that it was not the practice of the engineer of Tennant's crew to ring the bell, except to warn other crews of engines, pedestrians and yard clerks. The members of the crew knew all about the movement. (Rec. 83-4.) There is no evidence in this record which could create a reasonable inference that Tennant was depending on the engine bell to warn him at the time and place in question. The only reasonable inference from the undisputed testimony in the case is that he would not have expected a bell to warn him. He had not notified the engineer that he expected to remain in a place of danger. Moreover, the engineer thought he had gone off down to switch B-41, did not consider him a missing man, did not know him to be in danger. (Rec. 213.) Why does the Court infer that Tennant was depending upon the bell signal, when the established facts in the case are to the contrary?

But the Court has said: "The ringing of the bell *might well* have saved his life." It is readily seen that these are words of surmise and conjecture on the part of the Court. It is established in the record that this was a routine movement, done in the same manner every night, and that Tennant had participated in the work on twenty-four previous nights. He therefore was bound to know that, after the cars were coupled together on track B 28, the engine would shortly pull them north upon the lead. The purpose of the bell was to give warning of an engine movement. Tennant, however, was already warned and advised of the fact that the train would move, and that it would move at any time, without any signals from him. Under the presumption that he was acting in a careful and prudent manner, he was bound to have been watchful and observant of this impending movement. The Court is also asked not to forget the testimony of plaintiff's witness, Harkless,

that the engine never moved without releasing the air, which made a whizzing sound that could be heard a car length away. (Rec. 87-8.) This too was a warning. When the engine, *after releasing its air, commenced* to move, how can it be inferred, under the record, that Tennant did not observe it,—and if he did observe it, the bell, as a warning had become unnecessary,—no longer a part of the train of causation. It is more reasonable in this case to infer that the presumably alert Tennant knew of the backward movement of this train without any bell warning, and hence we must find some other cause of the accident than the failure to ring a bell. The only possible solution lies in the reasoning of the *Toops* case, which is discussed in the following section.

III.

We have pointed out that the Court has based its decision in this case upon a presumption that the deceased was engaged in the performance of his duties, standing in front of the engine, in the exercise of due care for his own safety, and also an inference that the ringing of the bell might well have saved his life, although both said presumption and inference run contrary to the undisputed evidence. The Court has then referred to other inferences which were emphasized by the court below, and states that these all suffer "from the same lack of direct proof as characteristics the one adopted by the jury." The Court then went on to say: "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." We are unable to perceive in what respect the circumstantial evidence was conflicting. There was no conflict in the testimony of Keeler, who said that he

had found a bit of flesh on the outside rim of the north wheel on the third car from the engine, and that there was no evidence of blood or flesh on the wheels of the Diesel engine, nor the first and second cars from the engine. (Rec. 138.) There is no dispute in the testimony of Thornberry, that the first blood mark on the rail was 317.6 feet south of the B-28 switch (Rec. 113), which was one of the switches Tennant was supposed to attend. These facts, duly established by evidence in the record, support other inferences as to the cause of death. Since there was no conflict as to said evidence, it *is* the function of the Court to search the record and consider them, particularly where the presumptions adopted by this Court are at variance with the established facts.

In *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391, this Court has said that where proven facts give equal support to inconsistent inferences, and neither are established, judgment must go agains the party upon whom rests the necessity of sustaining one of these inferences before he is entitled to recover; that an inference will be precluded where it appears from the evidence that the facts sought to be inferred did not exist. This Court went on to say in that case:

> "We think, therefore, that the trial court was right in withdrawing the case from the jury. It repeatedly has been held by this court that before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed'. * * *
>
> "Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This, of course, is inadmissible."

The Court has twice mentioned *Atchison, Topeka & Santa Fe R. Co.* v. *Toops*, 281 U. S. 351, in the opinion, yet not for comparison as to its facts with the case at bar. That case is almost on all fours with the instant case, although considerably stronger for the plaintiff. There was evidence in the Toops case of the violation of two rules, one requiring that a flagman be placed on the front of a leading car being pushed by an engine, for the purpose of signaling the engineer in case of need, and also that a white light be placed on the leading car at night. The proof was that no flagman and no light were on the leading car; that there was no warning signal by bell or whistle. Cars were kicked in this manner down a track toward which the deceased had gone. The desired inference in that case was that the deceased was run over while crossing the track in front of these unguarded cars. The Court used the *Looney* case for the purpose of raising a presumption that deceased, knowing that the cars would be moved on that track, proceeded with due care, and therefore was not run over while crossing the track in front of the cars. The circumstantial evidence was that there were no marks of blood or flesh on any part of the leading car, although such marks were found on the following cars. Therefore, the Court concluded:

> "What actually took place can only be surmised. Whether he was run down on the track by the first car, or he attempted unsuccessfully to board the train on one side or the other, or succeeded, and in either case, finally came to his death by falling under or between the moving cars, is a matter of guesswork."

The Court elsewhere held in the *Toops* case:

> "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employer's Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must

be withdrawn from its consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer * * *.

"Even though we assume that in all the respects alleged the petitioner was negligent, the record does not disclose any facts tending to show that the negligence was the cause of the injury and death * * *.

"If allowed to sustain the verdict, it would remove trial by jury from the realm of probability, based on evidence, to that of surmise and conjecture."

If we are here to use the doctrine of the *Looney* case, as it was applied in the *Toops* decision, it would create a presumption that Tennant was *not* waiting improperly between the rails, directly in front of the engine, which he knew would shortly move, out of sight of all crew members, where he could not observe signals. He had no further duties to perform around the cars after the first coupling was made, but the evidence is unmistakable that he elected to remain somewhere about them during the ten minute waiting period, perhaps going to the east side of the cut, unseen by the fireman, who was not looking all the time. (Rec. 217.) Plaintiff's witness Harkless said switchmen sometimes did this. (Rec. 86.) Upon the movement of the cut, is it not the logical presumption that he sought to regain the side of the train upon which signals were being given, from which he himself might perform the duty of giving signals to stop the cut when and where required? In the *Toops* case no blood was found on the wheels of the first car. Here there was no blood or flesh on the wheels of the engine, or the first car, or the second car. The first evidence of the accident was discovered on the north wheel of the third car from the engine. (Rec. 138.) Therefore, as in the Toops case, it is to be inferred that this was the car which ran over Tennant, that he must have fallen in some manner between the second and third cars. There is

no evidence or charge of a defective safety appliance. He may have fallen from the moving cars at the point where the engine previously had been standing, since, as Mr. Justice Murphy has said, the pool of blood was at that approximate point. Whey then does not the rule of the *Toops* case apply, that what actually took place can only be surmised, that this is not a question for the jury?

The foregoing inference that Tennant fell while climbing between the second and third cars is more reasonable than any other presumption or inference in this case. Other possible theories were advanced, but all yield to the evidence of the bit of flesh on the wheel of the third car and the lack of any evidence of an accident on the Diesel engine.

IV.

The Court has decided this case without all the evidence before it. The exhibits were not sent up with the record; and the first notice counsel for Respondent had of this was when he asked the Clerk for the plat of the northern part of the East Peoria yards (Defendant's Exhibit Two), for use in oral argument to the Court. This map would have informed the Court as to the exact track layout, distances, locations of the switches, location of the blood, etc. Other exhibits embraced the complete book of rules of the Respondent, photographs of the tracks, and close-up pictures of the Diesel engine, all of which were pertinent to a thorough analysis of this case.

Conclusion.

In conclusion the Respondent urges that a rehearing and reconsideration of the Court's opinion ought to be granted. This is a case in which a jury should never have been per-

mitted to guess or conjecture that a negligent act of Respondent was the actual cause of Tennant's death. We ask only for the measure of careful review which the Respondent is entitled to receive in this Court of last resort.

Respectfully submitted,

PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation,
Respondent.

By: EUGENE E. HORTON,
Its Attorney.

CERTIFICATE OF COUNSEL.

I, Eugene E. Horton, Attorney for the above named Respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

EUGENE E. HORTON,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 94.—October Term, 1943.

Mary Tennant, Administratrix of the Estate of Harold C. Tennant, Deceased, Petitioner, vs. Peoria and Pekin Union Railway Company.	On Writ of Certiorari to United States Circuit Court of Appeals for the Seventh Circuit.

[January 17, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

This action was instituted by petitioner, who is the administratrix of the estate and the widow of the deceased Harold C. Tennant, under the Federal Employers' Liability Act.[1] Recovery was sought for the alleged wrongful death of Tennant during the course of his employment as a member of a switching crew in one of respondent's railroad switching yards. The case was submitted to a jury, which returned a verdict in favor of petitioner and awarded her damages of $26,250. The District Court entered judgment accordingly. On appeal by respondent, the court below reversed this judgment after finding that, while there was evidence of negligence by respondent, there was no substantial proof that this negligence was the proximate cause of Tennant's death. 134 F. 2d 860. It held that the District Court should have directed a verdict in favor of respondent or allowed its motion for judgment notwithstanding the verdict. We granted certiorari because of important problems as to petitioner's right to a jury determination of the issue of causation.

Tennant was employed as a switchman in the "41" yard of respondent's switching yards in East Peoria, Illinois. He had worked there for several years and had been attached to the particular five-man switching crew for several months prior to the fatal accident. On the night of July 12, 1940, this crew was engaged in one of its nightly tasks of coupling freight cars and

[1] 35 Stat. 65, as amended; 36 Stat. 291; 53 Stat. 1404; 45 U. S. C. § 51.

removing them from track B-28. The electric Diesel engine used by the crew was brought down from the north through divide switch B-28 and onto track B-28, which extended straight north and south. The front or pilot end of the engine was headed south. There were about twenty cars in various groups on track B-28 at that time; they were to be coupled together and moved northward out of track B-28 to other locations.

In the course of these coupling operations, the engine stopped and started six or eight times, gradually moving southward. After all twenty cars had been coupled, the engine remained stationary for five or ten minutes before the engineer received the back-up signal from Harkless, the foreman. The engineer testified that the engine at this point was standing about five or six car lengths south of switch B-28, a car length approximating forty feet. There was other testimony, however, indicating that the engine was seven or eight car lengths south of the switch. While thus waiting for the back-up signal, the engineer saw Tennant on the west side of the engine placing his raincoat in a clothes compartment beneath the cab window. After putting on a cap and jacket he walked around the north or rear end of the engine and was never seen alive after that.

There was no direct evidence as to Tennant's precise location at the moment he was killed. There was some evidence to indicate that he never walked back on either side of the engine. It was his duty as a switchman or pin-puller to stay ahead of the engine as it moved back out of track B-28, protect it from other train movements, and attend to the switches.

The engine then pulled the twenty cars out of track B-28. The fact that Tennant was missing was first noticed when the engine reached a point some distance north of switch B-28. An investigation revealed blood marks on the west rail of track B-28 some 315 feet, or about seven or eight car lengths, south of switch B-28. There was a pool of blood a foot and a half north of those marks; near by, between the rails, were Tennant's right hand, his cap and his lighted lantern. His body was found at switch B-28, while his head was discovered about fourteen car lengths north and west of that switch. An examination of the engine and cars disclosed only a tiny bit of flesh on the outside rim of the north wheel of the third car from the engine. There was no evidence

of his having slipped or fallen from any part of the engine or cars.

The case was submitted to the jury on the allegation that Tennant's death resulted from respondent's negligence, in that its engineer backed the engine and cars northward out of track B-28 without first ringing the engine bell. The failure to ring the bell, which was not disputed, was alleged to be in violation of Rule 30 of respondent's rules for its employees. This rule provides that "The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grades, and to prevent accidents." There was conflicting evidence as to whether this rule was for the benefit of crew members who presumably were aware of switching operations and as to whether it was a customary practice for the bell to be rung under such circumstances. In addition, respondent placed great reliance on the provision of Rule 32 that "The unnecessary use of either the whistle or the bell is prohibited." This was said to demonstrate that the bell should not have been rung on this occasion.

In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. *Toledo v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67. Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. "The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *Galloway v. United States*, 319 U. S. 372, 395; *Atchison, Topeka & Santa Fe R. Co. v. Toops*, 281 U. S. 351. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the twelve jurors.

As to the proof of negligence, the court below correctly held that it was sufficient to present a jury question. In view of respondent's own rule that a bell must be rung "when an engine is about to move," it was not unreasonable for the jury to conclude that the failure to ring the bell under those circumstances constituted negligence. This was not an operation where bell ringing might be deemed unnecessary or indiscriminate. As a matter of law, [illegible]

Aerkfetz v. *Humphreys*, 145 U. S. 418, 420; *Toledo, St. L. & W. R. R.* v. *Allen*, 276 U. S. 165, 171. The engine had remained stationary for several minutes, during which the engineer saw Tennant disappear in the direction of the subsequent engine movement. Still not knowing the precise whereabouts of Tennant, the engineer then caused the engine and cars to make an extended backward movement. Such a movement, without a warning, was clearly dangerous to life and limb. *New York Central R. Co.* v. *Marcone*, 281 U. S. 345, 349. There was ample though conflicting evidence that respondent's written rule, as well as the practice and custom, required the ringing of the engine bell in just such a situation. We cannot say, therefore, that the jury's concurrence in that view was unjustified.

The court below erred, however, in holding that there was not sufficient proof to support the charge that respondent's negligence in failing to ring the bell was the proximate cause of Tennant's death. The absence of eye witnesses was not decisive. There was testimony that his duties included staying near the north or rear end of the engine as it made its backward movement out of track B-28. The location of his severed hand, cap, lantern and the pool of blood was strong evidence that he was killed approximately at the point where the engine began this backward movement and where he might have been located in the performance of his duties. To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death. *Looney* v. *Metropolitan R. Co.*, 200 U. S. 480, 488; *Atchison, Topeka & Santa Fe R. Co.* v. *Toops*, *supra*, 356; *New Aetna Portland Cement Co.* v. *Hatt*, 231 F. 611, 617. In addition, the evidence relating to the rule and custom of ringing a bell "when an engine is about to move" warranted a finding that Tennant was entitled to rely on such a warning under these circumstances. The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable "for . . . death resulting in whole or in part from the negligence of any of the . . . employees."[2]

[2] See note 1, *supra*.

In holding that there was no evidence upon which to base the jury's inference as to causation, the court below emphasized other inferences which are suggested by the conflicting evidence. Thus it was said to be unreasonable to assume that Tennant was standing on the track north of the engine in the performance of his duties. It seemed more probable to the court that he seated himself on the footboard of the engine and fell asleep. Or he may have walked back unnoticed to a point south of the engine and been killed while trying to climb through the cars to the other side of the track. These and other possibilities suggested by diligent counsel for respondent all suffer from the same lack of direct proof as characterizes the one adopted by the jury. But to the extent that they involve a disobedience of duty by Tennant no presumption in their favor exists. Nor can any possible assumption of risk or contributory negligence on Tennant's part be presumed in order to negate an inference that death was due to respondent's negligence.

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co.* v. *McDade*, 135 U. S. 554, 571; 572; *Tiller* v. *Atlantic Coast Line R. Co.*, *supra*, 68; *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to

enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case. We accordingly reverse the judgment of the court below and remand the case to it for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON concur in the result.

Mr. Chief Justice STONE and Mr. Justice ROBERTS are of opinion that the judgment should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.